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**THE LAW**  
**OF**  
**OPTION CONTRACTS**

**BY**  
**FRANK JAMES**  
**OF THE LOS ANGELES BAR**

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## PREFACE

Most of the material for this book was gathered by the author for use in his own practice. The cases examined were exhaustively collected on the particular point in hand at the time, carefully read and digested, and then made readily accessible by means of card indexes. The growing interest in the subject led him to undertake, in the same way, the work of covering the whole law of option contracts. In carrying out this undertaking, the author became more and more impressed with the growing importance of the option contract in every-day business life, and finding no work on the subject, was led to believe that the material in hand could be made helpful to the profession. This book is the result of that belief.

The author desires to thank his law partner, Walter E. Smith, Esq., of the Los Angeles Bar, for many valuable suggestions made by him and incorporated in this work.

FRANK JAMES.

LOS ANGELES, CALIFORNIA, March, 1916.





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- Sec. 1354. Agreement to purchase fruit on trees, with option to purchase the land, improvements thereon, and water rights, part of price deferred and secured by mortgage.
- Sec. 1355. Agreement by A to repurchase land conveyed by him to B in consideration for or in payment of shares of capital stock sold by B to A, the repurchase being at the option of B, with provision against assignment by B.
- Sec. 1356. Option to purchase and agency to sell on commission, the optionor binding himself to convey in penal sum with provision that if optionor fails to notify optionee, the option shall be renewed for one year.
- Sec. 1357. Agreement combining option to purchase and agency to sell on commission.
- Sec. 1358. Agreement held agency to sell and not option.
- Sec. 1359. Option agreement for property to be taken over by proposed corporation.
- Sec. 1360. Option to purchase land, the price payable in bonds of warehouse corporation, the issuance of which is to be authorized by Railroad Commission.
- Sec. 1361. Option to purchase with provision against recording option but providing for deposit of it with third person, and upon failure to give notice of election, to be surrendered for cancellation.
- Sec. 1362. Option clause requiring written notice of election and tender of price on delivery of deed of conveyance.

## MISCELLANEOUS.

- Sec. 1363. Will, option in, giving legatee right to purchase.



## CHAPTER I.

### DEFINITION, NATURE, INTERPRETATION AND CHARACTERISTICS.

- Sec. 101. Definition.
- Sec. 102. Nature and characteristics.
- Sec. 103. Option distinguished from offer.
- Sec. 104. Option distinguished from offer. Cases.
- Sec. 105. Option distinguished from sale.
- Sec. 106. Option distinguished from sale. Cases. Offers and options.
- Sec. 107. Option distinguished from sale. Cases continued. Offers and options.
- Sec. 108. Option distinguished from agreement of sale. Sales.
- Sec. 109. Option distinguished from agreement of sale. (Penalty, forfeiture and liquidated damage clauses.)
- Sec. 110. Option distinguished from agreement of sale. (Provisions for terminating agreement, etc.)
- Sec. 111. Option to purchase distinguished from option to return.
- Sec. 112. Same. Cases.
- Sec. 113. Option distinguished from lease.
- Sec. 114. Option distinguished from agency.
- Sec. 115. Option distinguished from mortgage or deed.
- Sec. 116. Option distinguished from other kinds of contracts. Miscellaneous.
- Sec. 117. Option to terminate contract.
- Sec. 118. Alternative stipulation.
- Sec. 119. Option to mature chattel mortgages.
- Sec. 120. Option to mature debt secured by real estate mortgage.
- Sec. 121. Same. Exercise of option. Waiver.
- Sec. 122. Interpretation. Rules of construction.
- Sec. 123. Interpretation. Rules of evidence.
- Sec. 124. Interpretation. Miscellaneous.

**SECTION 101. DEFINITION.**—An option to purchase is a contract supported by a consideration, or in some jurisdictions, a writing under seal, by which one party, called optionor, sells to another party, called optionee, the right, at the election of the latter, to purchase certain described property, for the price, and upon the terms and conditions of the option contract.<sup>1</sup>

<sup>1</sup> See *Snider v. Yarbrough*, 43 Mont. 203, 115 P. 411; *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687; *Tilton v. Sterling*, 28 Utah 173, 77 P. 758, 107 Am. Rep. 689; *Swift v. Erwin*, 104 Ark. 459, 148 S. W. 267; *Montgomery v. Hundley*, 205 Mo. 138, 103 S. W. 527.

An option contract to purchase has been variously defined or described by the courts as follows: A right by election in the optionee to exercise a privilege, *Hopwood v. McCausland*, 120 Iowa 218, 94 N. W. 469; *Winslow v. Dundom*, 46 Mont. 71, 125 P. 136.

A right of choice or election, *Montgomery v. Hundley*, 205 Mo. 138, 103 S. W. 527.

A proposition by the owner of land to sell it, *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171.

A contract by which the owner merely sells the right or privilege to buy at the election of the other party, *Hamburger v. Thomas* (Tex. Civ. App.), 118 S. W. 770; *Montgomery v. Waldeck*, 2 Alaska 581.

A continuing offer, *Caldwell v. Frazier*, 65 Kan. 24, 68 P. 1076; *Napier v. Darlington*, 70 Pa. 64.

An obligation by which one binds himself to sell and leaves it to the discretion of the other party to buy, *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541.

A contract to leave open an offer to sell something for a certain time, *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645; *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; *Raddle v. Lindemann*, 151 Ill. App. 441; *Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687.

A unilateral agreement containing the terms and conditions upon which the vendor agrees to sell and convey his land, not yet ripened into an absolute contract to sell and convey, on one side and to purchase and pay on the other, *Barnes v. Hustead*, 219 Pa. 287, 68 Atl. 839.

An unaccepted offer to sell and convey within the time and upon the conditions set forth in the option contract, *Barnes v. Rea*, 219 Pa. 279, 68 Atl. 836.

A conditional agreement to convey, *Page v. Martin*, 46 N. J. Eq. 585, 20 Atl. 46, 48.

An option to sell differs from an option to purchase in that the right of election is with the seller.<sup>2</sup>

An option to return is an agreement whereby the purchaser is given the privilege of returning the property to the seller, or if the title has passed, of rescinding the sale, on certain specified conditions.<sup>3</sup> These agreements assume various forms, the most common being sale on trial or approval.<sup>4</sup>

Another common form is the option to repurchase. This arises out of a transaction whereby property is sold and the seller is given an option to repurchase the same property from the purchaser.<sup>5</sup> This option is sometimes spoken of as redemption.

<sup>1</sup> An exclusive privilege to buy, *Benedict v. Pincus*, 191 N. Y. 377, 84 N. E. 284.

The sale of the power to withdraw an offer to sell property, or to retract a promise to keep the offer open for the time limited, *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853.

A contract by which the owner of property for a limited time parts with his right to sell to another person during such time, and gives the optionee the exclusive right to purchase during that time, *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403.

The privilege by the optionee of choosing whether or not he will perform or claim performance of the contract by the optionor, *Pittsburg, etc. Co. v. Bailey*, 76 Kan. 42, 90 P. 803.

A mere solicitation not yet ripened into a perfect commutative contract, *Schlieder v. Dielman*, 44 La. Ann. 462, 10 So. 934; *Rivers v. Sugar Co.*, 52 La. Ann. 762, 27 So. 118; *Kirby etc. Co. v. Burnett*, 114 Fed. 635, 75 C. C. A. 437.

<sup>2</sup> *McFarland v. McCormick*, 114 Iowa 368, 86 N. W. 369; *Hollis v. Libby*, 101 Me. 302, 64 Atl. 621; *Owensboro Wagon Co. v. H. L. Riggan & Co.*, 151 N. C. 303, 66 S. E. 126; *Park v. Whitney*, 148 Mass. 278, 19 N. E. 161; *Pearce v. Turner*, 150 Ill. 116, 36 S. E. 962; *Pursley v. Good*, 94 Mo. App. 382, 68 S. W. 218; *Raiche v. Morrison*, 47 Mont. 127, 130 P. 1074; *Vickery v. Maier*, 164 Cal. 384, 129 P. 273.

<sup>3</sup> See Sec. 111.

<sup>4</sup> See Secs. 828-830.

<sup>5</sup> See Sec. 829.

A bailment of personal property with option to purchase combines the ordinary contract of bailment with an option to purchase the property bailed.<sup>6</sup>

Right of "pre-emption" frequently found in leases, is construed "to express the idea that some one has the first right to purchase when the land is offered for sale, or the option of buying first," thus giving it the same meaning as "first refusal" or "preferential right" to purchase.<sup>7</sup>

The option contract assumes various forms. It is found in leases giving the lessee the right to renew or extend the term; in contracts generally giving one or either of the parties the right to terminate the contract; in oil and mining leases giving the lessee the option to improve and work the property or to pay a stipulated rental in lieu thereof, and so on, but, subject to a few exceptions which will be noted later, in proper places, the rights and liabilities growing out of each kind of option contract are measured and tested by the same rules of law.

SEC. 102. NATURE AND CHARACTERISTICS.—The chief and distinguishing characteristics of an option contract to purchase is that it binds the optionor to sell property but does not, without election, obligate the optionee to buy. The thing contracted for and sold is the right of election to purchase. The optionor parts only with the right to sell the property to any other person during the time limited, and the optionee receives only

<sup>6</sup> See Sec. 828.

<sup>7</sup> See Secs. 211, 212.



the right of choice whether he will claim performance of the option contract.<sup>1</sup>

The property optioned is not, strictly speaking, the subject matter of the contract. On the contrary, it is the right of election to purchase.<sup>2</sup> Consequently, no estate or interest in the property passes upon execution of the option contract. However, the optionee acquires certain rights to the property which courts, upon equitable grounds, will protect.<sup>3</sup>

The nature of an option contract implies that the optionee, prior to election, assumes no obligation.<sup>4</sup> He makes no promise to purchase. The contract is unilateral, and continues such until an election to purchase by the optionee, whereupon it becomes a binding promise on the part of the

<sup>1</sup> *Pittsburg etc. Co. v. Bailey*, 76 Kan. 42, 90 P. 803; *Couch v. McCoy*, 138 Fed. 696; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Myers v. Metzger*, 61 N. J. Eq. 522, 48 Atl. 1113.

An option, therefore, is necessarily exclusive whether or not so expressed, *McLaurin v. Cuba Co.*, 84 N. Y. S. 526, 87 App. Div. 558, but this does not mean that the optionor may not sell his rights in the property subject to the option, *Elliott v. DeLaney*, 217 Mo. 14, 116 S. W. 494.

<sup>2</sup> *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; *Barnes v. Hustead*, 219 Pa. 287, 68 Atl. 839; *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853.

<sup>3</sup> See Secs. 514, 515.

<sup>4</sup> *Perrigo v. City of Milwaukee*, 92 Wis. 236, 65 N. W. 1025; *Connor v. City of Marshfield*, 128 Wis. 280, 107 N. W. 639; *Overall v. Madisonville*, 125 Ky. 684, 102 S. W. 278, 31 Ky. L. Rep. 278, 12 L. R. A. (N. S.) 433, not debt against city; *Benedict v. Pincus*, 191 N. Y. 377, 84 N. E. 284; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150; *Snider v. Yarbrough*, 43 Mont. 203, 115 P. 411.

optionor to convey.<sup>5</sup> However, the option contract, though unilateral, is executed.<sup>6</sup>

The covenants in an option contract are not mutual, because the optionee is not bound to perform, and mutuality implies an obligation on each party to the contract to do, or permit to be done something in consideration of an act or promise of the other party.<sup>7</sup> But as we shall point out later on, this lack of mutuality is not, in a proper case, a bar to specific enforcement of the contract.<sup>8</sup>

Like all other contracts an option must be supported by a consideration,<sup>9</sup> or be evidenced by a sealed writing;<sup>10</sup> otherwise the transaction resolves itself into one of mere offer or proposal, which

<sup>5</sup> *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; *Benedict v. Pineus*, 191 N. Y. 377, 84 N. E. 284; *Boyer v. Nesbitt*, 227 Pa. 398, 76 Atl. 103; *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171; *Barton v. Thaw*, (Pa.) 92 Atl. 312; *Rampton v. Dobson*, 156 Iowa 315, 136 N. W. 682. See Sec. 871.

It is said in *High Wheel Auto Parts Co. v. Journal Co. of Troy*, (Ind. App.) 98 N. E. 442, that the term "unilateral contract," as expressing the idea of a contract lacking in mutuality, is a legal solecism.

<sup>6</sup> That is, as to the sale of the option privilege, but not as a sale of the property, *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403.

*Elliott v. DeLaney*, 217 Mo. 14, 116 S. W. 494, where the consideration is paid.

*Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522, where consideration is paid.

See *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645; *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830, 831; *Prior v. Hilton & D. L. Co.*, 141 Ga. 117, 80 S. E. 559.

<sup>7</sup> *Barnes v. Hustead*, 219 Pa. 287, 68 Atl. 839. See Secs. 1213, et seq.

<sup>8</sup> See Secs. 1213, et seq.

<sup>9</sup> See Secs. 301, et seq.

<sup>10</sup> See Secs. 332, et seq.

may be withdrawn by the optionor at any time before acceptance by the optionee.<sup>11</sup>

From what has been said it follows that a mere offer is not an option contract, and that the law relating to mere offers, or proposals, which have not been accepted, is not applicable to option contracts so far as relates to the rights of the respective parties.<sup>12</sup>

**SEC. 103. OPTION DISTINGUISHED FROM OFFER.**—A mere offer is a proposal to sell or to buy, or more broadly, a proposal to do some act, the acceptance of which will create a legal relation.<sup>1</sup> It is the first step in the negotiation of all contracts, including, of course, option contracts. The second step is the acceptance of the offer. This completes the making of a bilateral contract, but a technical “acceptance” of an option is unnecessary to the completion of an option contract. This results from the nature of the option, since, in the language of the decisions, the very thing granted by an option contract is the right of election to make or complete the contract of sale and purchase. The option contract, however, is completed upon its execution and delivery and payment or tendering of the consideration, or the performance of the

<sup>11</sup> See Sec. 703.

<sup>12</sup> See Sec. 103.

<sup>1</sup> “It is important to distinguish between an offer to sell something which offer may, or may not, become a completed contract by acceptance in the future, and a contract to leave that offer open for a time which if accepted becomes, at once, an executed contract. Only the last is an option,” *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723.

Option to sell, *Barker v. Critzer*, 35 Kan. 459, 11 P. 382.

act which constitutes the consideration for the option.<sup>2</sup> No other act is necessary on the part of the optionee to continue the binding effect of the option contract during the time limit, unless, of course, the option contract otherwise provides.

A mere offer, that is, an offer not supported by a consideration, or under seal, is a mere proposal, or first invitation, to make a contract and has no binding effect, either upon the party making the offer or upon the party to whom it is made, until accepted by the latter.<sup>3</sup>

An election to purchase or to deliver under an option contract must not, therefore, be confused with the technical acceptance of a mere offer. It is true the effect of an election on the one hand and of an acceptance on the other is, in the cases stated, the same in that a bilateral contract is raised, but a technical acceptance of an option contract, unless rendering the consideration therefor shall be called an acceptance, is not necessary to the consummation of an option contract.<sup>4</sup>

A mere unaccepted offer is *nudum pactum*. An option contract, even before election and notice, is not a nude pact. It is enforceable by the optionee upon due election and notice, and tender, when tender is necessary.

<sup>2</sup> See *Cummings v. Nielson*, 42 Utah 157, 129 P. 619; *Prior v. Hilton & D. L. Co.*, 141 Ga. 117, 80 S. E. 559.

<sup>3</sup> *McLaurin v. Cuba Co.*, 84 N. Y. S. 526, 87 App. Div. 558; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571.

<sup>4</sup> *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; *Montgomery v. Hundley*, 205 Mo. 138, 103 S. E. 527; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25; *Myers v. Metzger*, 61 N. J. Eq. 522, 48 Atl. 1113.

A mere offer is a personal privilege and is not, therefore, assignable, at least in the absence of a provision for assignment. Option contracts are assignable in accordance with the rule in the respective jurisdictions governing assignment of contracts.<sup>5</sup>

SEC. 104. OPTION DISTINGUISHED FROM OFFER. CASES.—A letter from plaintiff reciting that he would not withdraw certain land from the market until January 1904, during which time defendant could send his men to look it over, and if, at the expiration of that time, defendant desired to take the land, plaintiff would give him a warranty deed at the rate of \$20 per acre, is a mere offer and not an option.<sup>1</sup> The decision was placed on the ground there was no consideration to uphold the offer, thus leaving it revocable by the writer during the time limit.

A writing signed by an owner of a house in which he offers to sell it to another at a certain price and upon certain conditions, is a mere proposal, or offer, and not a contract.<sup>2</sup>

A provision in an agreement of sale providing that it was not the intention of the seller to bind any of the parties to the completion of the transaction, makes the agreement a mere offer.<sup>3</sup>

The owner signed a document which purported to be an agreement to sell. A postscript was added

<sup>5</sup> *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830; see Secs. 601, et seq.

<sup>1</sup> *Comstock Bros. v. North*, 88 Miss. 754, 41 So. 374.

<sup>2</sup> *Tucker v. Woods*, (N. Y.) 12 Johns. 190, 7 Am. Dec. 305; also *Weiden v. Woodruff*, 38 Mich. 130.

<sup>3</sup> *Sirk v. Ela*, 163 Mass. 394, 40 N. E. 183.

and signed by the owner stating that the offer would be left open till a certain date, and it was held that the document was a mere offer.<sup>4</sup>

**SEC. 105. OPTION DISTINGUISHED FROM SALE.**—A sale is the transfer of the property in a thing for a price in money. A sale also contemplates the transfer of the possession of the thing. An agreement of sale is a contract by which the seller agrees to sell, and the buyer agrees to purchase, the property in a thing for a price in money. The distinction, therefore, between a sale, or an agreement of sale, on the one hand and an option contract on the other, is very apparent. An option contract does not bind the optionee to purchase the property. An agreement of sale does. The thing directly contracted for, in an agreement of sale, is the property; in an option contract, it is the right of election to purchase the property.<sup>1</sup>

An option contract, as we shall see later on,<sup>2</sup> ripens into an agreement to sell when the optionee exercises his right of election to purchase and gives the required notice. By election and notice the option contract is turned into an agreement to sell.

<sup>4</sup> *Dickinson v. Dodds*, L. R., 2 Ch. Div. 463, 34 L. T. (N. S.) 607.

<sup>1</sup> “Unilateral” and “bilateral” contracts defined, *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687; *Darr v. Mummert*, 57 Neb. 378, 77 N. W. 767.

A contract of sale is where there is an agreed price, a vendor, a vendee, an agreement of the former to sell for an agreed price, and an agreement of the latter to buy and pay the agreed price, *In re Allen*, 183 Fed. 172. An option to purchase is merely an agreement whereby the optionor may, upon compliance with certain terms and conditions, become the owner of the property, *Id.*

<sup>2</sup> See Sec. 871.

The particular method, or means, by which an agreement of sale is consummated, that is, whether, by election under the option contract, or by agreement of sale in the first instance, is immaterial.

While the distinction between the two kinds of contract is well defined, difficulty is sometimes experienced in determining the classification. Option contracts often assume the form and language of an agreement of sale. Interpretation, of course, is the key to the situation. The intention of the parties is the first and the cardinal rule.<sup>3</sup>

It may be laid down as an established rule of law that unless the contract contains language which may reasonably be construed as an agreement on the part of the vendee to purchase the property, or to assume some obligation thereunder, it will be held to be an option contract and not an agreement of sale and purchase.<sup>4</sup> It is impossible to conceive of an agreement of sale and purchase

<sup>3</sup> Collier v. Robinson, 53 Tex. Civ. App. 285, 129 S. W. 389; Clark v. Cagle, 141 Ga. 703, 82 S. E. 21.

<sup>4</sup> Indiana etc. L. Co. v. Pharr, 82 Ark. 573, 102 S. W. 686; Gordon v. Swan, 43 Cal. 564; White v. Bank of Hanford, 148 Cal. 552, 83 P. 698; Strauss v. Brier, (Colo.) 140 P. 183, patent; Simpson v. Sanders, 130 Ga. 265, 60 S. E. 541; Kessler v. Prnitt, 14 Idaho 175, 93 P. 965, on rehearing, p. 970; Cortelyou v. Barnsdall, 236 Ill. 138, 86 N. E. 200, oil lease; O'Neill v. Risinger, 77 Kan. 63, 93 P. 340, oil and gas option; Darr v. Mummert, 57 Neb. 378, 77 N. W. 767; Swank v. Fretts, 209 Pa. 625, 59 Atl. 264; Uhlman v. Sullivan, 242 Pa. 436, 89 Atl. 550, held to be an option, though no express promise to pay the consideration; Gira v. Harris, 14 S. D. 537, 86 N. W. 624; Wheeling Creek etc. Co. v. Elder, 170 Fed. 215; Witherspoon v. Staley, (Tex. Civ. App.) 156 S. W. 557; Heydrick v. Dickey, 154 Ky. 475, 157 S. W. 915.

But a contract reciting that one party has "sold" to another certain goods is binding on the latter when signed by the agent of both, though it does not recite that the latter "purchased" the goods, Butler v. Thompson, 92 U. S. 412, 23 L. Ed. 684.

and without obligation on the part of the vendee to purchase. On the other hand, the absence of such obligation is the distinctive characteristic of an option contract. A contract of sale creates mutual obligations on the part of the seller to sell, and on the part of the purchaser to buy, while an option gives the right to purchase, within a limited time, without imposing any obligation to purchase.<sup>5</sup>

SEC. 106. OPTION DISTINGUISHED FROM SALE. CASES. OFFERS AND OPTIONS.—

An agreement to convey land to plaintiff, for a certain sum, if plaintiff desired to purchase the land after the completion of a well then being drilled for oil on an adjoining tract of land belonging to another person, is an “option.”<sup>1</sup>

A writing signed by the vendor alone in which he recites he has sold the land to the vendee, for a certain price, and is to receive a certain sum as deposit and part payment, the sale to be subject to a search and approval of title, and giving the vendee twenty days for examination of the title, is a mere proposal.<sup>2</sup>

<sup>5</sup> *Brickell v. Atlas Assur. Co.*, 10 Cal. App. 17, 101 P. 16, test is right to specific performance; *In re Allen*, 183 Fed. 172; see *Ellsworth v. So. Minn. R. El. Co.*, 31 Minn. 543, 18 N. W. 822; *Dillinger v. Ogden*, 244 Pa. 20, 90 Atl. 446; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723.

Assignment of option held to be an option and not sale and did not, therefore, bind the assignee to pay the price for the assignment in the absence of an election by him, *Caine v. Hagenbarth*, 37 Utah 69, 106 P. 945.

<sup>1</sup> *Laughner v. Smith*, 232 Ill. 534, 83 N. E. 1052.

<sup>2</sup> *Vassault v. Edwards*, 43 Cal. 458.



A contract by which a land owner agreed to convey certain land on each side of its right of way, at any time within two years, whenever required by the vendee, provided it should pay him \$1, which it covenanted to pay upon the execution and delivery of the deed, is simply a contract conferring an "option" on the vendee to secure a conveyance.<sup>3</sup>

A writing giving defendant, in consideration of \$2,000 paid, the exclusive privilege, to a certain date, to purchase certain land, at a certain price, and providing that if on or before that date defendant did not pay an additional sum named, the agreement should be void and the \$2,000 returned, is, until the expiration of the fixed time, an "option."<sup>4</sup>

Defendant gave a land company the exclusive sale of certain lands for ninety days from August 21, 1907, on condition that a sale then pending was not closed on or before that date; the land company agreeing to sell at \$8 per acre, and was permitted to retain all in excess of that amount as its commissions. The land company agreed to sell all of the land and also agreed that if any land remained, at the expiration of the stipulated time, it would buy the same itself. This was held "but an option."<sup>5</sup>

A paper signed by A by which he agrees that B, in consideration of \$1 paid, shall for thirty days,

<sup>3</sup> Louisville etc. R. Co. v. Gulf etc. Co., 82 Miss. 180, 33 So. 845, 100 A. S. R. 627.

<sup>4</sup> Kingsley v. Kressly, 60 Ore. 167, 118 P. 678; Martin v. Wilson, 24 Idaho 353, 134 P. 532, holding a "void" and "no effect" clause made the agreement an option.

<sup>5</sup> Pope v. Ansley Realty Co., (Tex. Civ. App.) 135 S. W. 1103.

have the "refusal" on certain lands, and that he will convey the same in consideration of \$20 per acre, \$500 to be paid on the execution of the deed and the balance secured by mortgage on the land, specifying the rate of interest, but not any time for the delivery of the deed, nor the length of time the mortgage was to run, is a "refusal" or "offer" and not a contract of sale.<sup>6</sup>

SEC. 107. OPTION DISTINGUISHED FROM SALE. CASES CONTINUED. OFFERS AND OPTIONS.—The mortgagor, to stop foreclosure proceedings, conveyed the property to the mortgagee in discharge of the debt. The mortgagee executed an agreement to reconvey any of the tracts to the mortgagor, at any time within two years, for certain prices and interest. The agreement to reconvey was held an "option" and not a conditional sale.<sup>1</sup>

An agreement by the optionor to convey to the optionee, within a certain time, and providing for an extension of time to five years, at a certain price, for each lot of a certain tract sold, the optionee to pay taxes and assessments and interest, and permitting the optionee to build houses on each lot, within a certain time, the optionor to receive second mortgages, in certain amounts, in payment of the balance of the price for the lots sold, and providing that no estate or interest in the land was to pass beyond the right to build the houses, is

<sup>6</sup> Potts v. Whitehead, 21 N. J. Eq. 55. *affirmed* 23 N. J. Eq. 512.

<sup>1</sup> Neeson v. Smith, 47 Wash. 386, 92 P. 131.

an "option" and not an "executory contract to purchase."<sup>2</sup>

A contract by plaintiff to sell, and by defendant's predecessors in interest to buy, certain mining property, and which is personal, and does not, in terms, run "to heirs and assigns" and under which the prospective grantees, although given possession, could neither sell nor assign without the grantor's assent, until they had become entitled to a deed by performance of certain conditions, and one of which was to pay the grantor a certain sum out of the property, is a mere "option."<sup>3</sup>

Defendants signed a writing as follows: "Received from C the sum of \$50 on account of said price of \$25,500 on the sale of said premises; \$950 to be paid on this day and \$24,500 on delivery of the deed, contract to be made at the office of N." It was held the writing was not a contract for the purchase of the premises, "but merely an option."<sup>4</sup>

An agreement whereby the parties of the first part in consideration of \$5 per acre "for which \$1 in hand paid, the remainder to be paid within thirty days," bargained certain described property, and contracted to make a warranty deed at any time within thirty days, the second party "paying the remainder of \$5 per acre per contract," is an "option," and not a sale of the land.<sup>5</sup>

<sup>2</sup> Moore v. Allen, 109 Minn. 139, 123 N. W. 292.

<sup>3</sup> Smith v. Jones, 21 Utah 270, 60 P. 1104; see Witherspoon v. Staley, (Tex. Civ. App.) 156 S. W. 557; Harper v. Ind. Devp. Co., 13 Ariz. 176, 108 P. 701, option on mine with privilege of working.

<sup>4</sup> Levy v. Kottman, 11 Misc. Rep. 372, 32 N. Y. S. 241; see also Seidman v. Rauner, 99 N. Y. S. 862, 51 Misc. Rep. 10.

<sup>5</sup> Noe v. Saylor, 143 Ky. 254, 136 S. W. 209; see also Title etc. Co. v. McDonnell, 32 Wash. 418, 73 P. 484.

Where plaintiff contracts to sell a mining claim for a certain sum to be paid on or before a certain day, and the deed purporting to convey title to the purchaser is left in his possession but not as an absolute conveyance, and a reconveyance by the purchaser to the plaintiff is placed in escrow, to be delivered to plaintiff upon failure of the purchaser to make the payment, all bearing the same date, the transaction constitutes an "option."<sup>6</sup>

<sup>6</sup> *Conway v. Hart*, 129 Cal. 480, 62 P. 44; see, however, *Bonanza M. etc. Co. v. Ware*, 78 Ark. 306, 95 S. W. 765, where the vendor executed note for price and deed was placed in escrow to be delivered upon payment of note; held agreement of sale.

Cable correspondence held option and not sale, *Pomeroy v. Newell*, 102 N. Y. S. 1098, 117 App. Div. 800.

The fact that deposits are made by the parties to secure performance does not transform the option into a sale, *Nagel v. Cohen*, 112 N. Y. S. 1066. See, however, Sec. 109, note 4.

Agreement to purchase car wheels held an "option," *Northwestern etc. Co. v. Railway Co.*, 94 Wis. 603, 69 N. W. 371.

An agreement to sell certain described land to E and plaintiff "or either of them," is an "offer to sell" to either and not a sale, *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485.

An agreement to sell merchandise, with right of optionee to countermand, held an "option" and not agreement of sale, *Moise v. Rock Springs Distilling Co.*, 79 Neb. 124, 112 N. W. 372.

Transaction to repurchase shares of stock held "option," *Sayward v. Houghton*, 119 Cal. 545, 51 P. 853, 52 P. 44.

Contract relating to sale of cotton held an "option," *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 596.

Contract relating to timber, held option, *Union Sawmill Co. v. Lake L. Co.*, 120 La. 106, 44 So. 1000.

Contract held to give each party "option" to buy the property of the other, *Hooker Steam Pump Co. v. Buss*, 240 Mo. 465, 144 S. W. 419.

"Option" to vendor to repurchase, *Jeffreys v. Charlton*, 72 N. J. Eq. 340, 65 Atl. 711.

Option to require defendant to repurchase stock and not absolute agreement to repurchase, *Scott v. Goodin*, 21 Cal. App. 178, 131 P. 76. See *McFarland v. McCormick*, 114 Iowa 368, 86 N. W. 369.

Option to return shares involving necessity of tendering back the shares, *Boynton v. Woodbury*, 101 Mass. 346.

SEC. 108. OPTION DISTINGUISHED FROM AGREEMENT OF SALE. SALES.—A bond reciting that the parties have purchased a lot and have paid thereon \$50 and are to make further payments, and that, on making such payments, the lot is to be deeded to them, is a contract of sale and not a “mere option.”<sup>1</sup>

A contract reciting that defendant agreed to buy and pay cash for a certain tract of timber, and that he would take the timber at a certain advance on the price paid by plaintiff, establishes the relation of vendor and vendee and is not a “mere option.”<sup>2</sup>

John v. Elkins, 63 W. Va. 158, 59 S. E. 961, land to be paid for on delivery of deed “after notice of acceptance”; also Swank v. Fretts, 209 Pa. 625, 59 Atl. 264.

Grabenhorst v. Nicodemus, 42 Md. 236, option on distillery.

Gold Spring D. Co. v. Stitzel D. Co., 150 Ky. 457, 150 S. W. 516, warehouse receipts for barrels of whiskey to be delivered as requested and taken and paid for by optionee.

Gard v. Thompson, 21 Idaho 485, 123 P. 497, water supply.

Elliott v. DeLaney, 217 Mo. 14, 116 S. W. 494, lease.

Berwind v. Williams, 172 Pa. 1, 33 Atl. 353, contract for possession after judgment in ejectment.

Snider v. Yarbrough, 43 Mont. 203, 115 P. 411, mine.

Option under Louisiana law, Whited v. Calhoun, 122 La. 100, 47 So. 415.

Womack v. Coleman, 92 Minn. 328, 100 N. W. 9, option on option.

W. Irving S. Bros. Co. v. Herold, 81 Mo. App. 461, order for twine.

Clark v. Eastlake L. Co., 158 N. C. 139, 73 S. E. 793.

Absolute sale with option to select brand of timber, Storm v. Rosenthal, 141 N. Y. S. 339.

Delivery of pictures on approval, held option, Steinhauer v. Henson, 54 Colo. 246, 131 P. 255.

Provision in contract of sale that it is subject to prior option does not make the contract a mere offer, Lansing Co. v. Rogers, (Mich.) 149 N. W. 1000.

<sup>1</sup> Vance v. Newman, 72 Ark. 359, 80 S. W. 574, 105 A. S. R. 42.

<sup>2</sup> Sitterding v. Grizzard, 114 N. C. 108, 19 S. E. 92.

2—Option Contracts.

An agreement embodied in a letter reciting that the writer will give \$250 for a contract of land and specifying the terms of payment, and the reply by the owner accepting the offer, is an agreement on the part of the owner to sell and is not a "mere option."<sup>3</sup>

A memorandum reading, "Received of A \$5 as a part payment" for a certain lot "conditioned as follows: \$2495 to be paid on or before the 20th day of March, 1888, and the balance of \$1500 to run on time to suit convenience," with an agreement to furnish a warranty deed on payment of the \$2495, is not an "option" merely, but an agreement of sale which may be enforced by the buyer.<sup>4</sup>

A contract for the purchase of land which recites that the vendor has received a certain sum on account of the purchase money "this day sold to him (vendee) by me," and which then sets forth the terms of sale which are to be complied with in fifteen days, or deposit money to be forfeited, is one of bargain and sale and not an "option."<sup>5</sup>

An agreement by landowners to sell land to named parties for a certain sum, part payment on

<sup>3</sup> *Cummings v. Nielson*, 42 Utah 157, 129 P. 619; also *Roberts v. Braffett*, 33 Utah 51, 92 P. 789; see *Hobart v. Frederiksen*, 20 S. D. 248, 105 N. W. 168.

<sup>4</sup> *Langert v. Ross*, 1 Wash. 250, 24 P. 443; see also *Menzel v. Primm*, 6 Cal. App. 204, 91 P. 754; *Ellis v. Bryant*, 120 Ga. 890, 48 S. E. 352; *Slayden & Co. v. Palmo*, 53 Tex. Civ. App. 227, 117 S. W. 1054; *Newell v. Lamping*, 45 Wash. 304, 88 P. 195; *Roberts v. White River Power Co.*, 30 Wash. 430, 70 P. 1104, right of way; *Monongah Coal etc. Co. v. Fleming*, 42 W. Va. 538, 26 S. E. 201.

<sup>5</sup> *Hazelton v. LeDue*, (D. C.) 10 App. Cas. 379; also *Hamburger v. Thomas*, (Tex. Civ. App.) 118 S. W. 770; *Benson v. Shotwell*, 87 Cal. 49, 25 P. 249.

which was acknowledged, and agreeing to furnish an abstract of title which the vendees were to have three days to examine, and within which to consummate the deal, is an agreement of sale.<sup>6</sup>

An agreement certifying that "I have this day sold to (a corporation) my claim" to certain lands and acknowledging receipt of the price, and which is signed by the vendor, is an express agreement to convey.<sup>7</sup>

An agreement endorsed on a mining lease and stipulating "that if the parties of the second part shall, at the expiration of two years from the date hereof, pay unto said W & D the sum of \$10,000 in lieu of the ten per cent agreed upon in said lease, then the said W & D shall make a good and lawful deed of conveyance for the above described premises in this lease," etc., is an absolute agreement by the lessees to purchase.<sup>8</sup>

A contract for the sale of land at a specified sum per acre, which recited that plaintiff thereby sold to defendant certain described land, title papers to be furnished by plaintiff without delay, and defendant to ascertain the acreage by a specified date, is an absolute contract of purchase and sale and not an option.<sup>9</sup>

<sup>6</sup> Cheek v. Nicholson, (Tex. Civ. App.) 133 S. W. 707.

<sup>7</sup> Anderson v. Wallace L. etc. Co., 30 Wash. 147, 70 P. 247.

<sup>8</sup> Suffern v. Butler, 21 N. J. Eq. 410; see Baraboo Land etc. Co. v. Winter, 130 Wis. 457, 110 N. W. 413, distinguishes Nelson v. Stephens, 107 Wis. 136, 82 N. W. 163; Chapman v. Propp, 125 Minn. 447, 147 N. W. 442.

<sup>9</sup> Golden v. Cornett, 154 Ky. 438, 157 S. W. 1076.

An agreement to deliver stock in blocks of five shares or more, as called for by the vendee, is not an option, but an agreement of purchase.<sup>10</sup>

A will providing that on the death of the life tenant, testator's son should "have" the land at a specified price and that the proceeds should be divided among all the children, did not give the son a mere option to purchase, but gave him the land charged with the payment to the children.<sup>11</sup>

A contract for a retail automobile agency, and for the future purchase of cars by the agent, providing for a deposit, part of which is to be applied on the contract for five cars ordered, and that the agent was to "purchase five cars, optional," binds the agent absolutely to purchase, and gives him only the option to select the cars from a list set out in the contract.<sup>12</sup>

<sup>10</sup> *Cragin v. O'Connell*, 63 N. Y. S. 1071, 50 App. Div. 399, affirmed 169 N. Y. 573, 61 N. E. 1128; see also *Edwards v. Capps*, 122 Ga. 827, 50 S. E. 943; *Cooper v. Bay State Gas Co.*, 127 Fed. 482; *Provident G. M. Co. v. Manhattan Sec. Co.*, (Cal.) 142 P. 884.

<sup>11</sup> *Mohn v. Mohn*, 148 Iowa 288, 126 N. W. 1127.

<sup>12</sup> *Alden v. Kaiser*, 121 Minn. 111, 140 N. W. 343.

Agreement for possession and improvements held one of sale, *Harless v. Pelty*, 98 Ind. 53.

Receipt held agreement of sale, *Gibbons v. Sherwin*, 28 Neb. 146, 44 N. W. 99.

*Colwell v. Fulton*, 117 Fed. 931, sale and not option; *Davis v. Robert*, 89 Ala. 402, 8 So. 114, 18 A. S. R. 126.

Vendee in possession, *Cone v. Cone*, 118 Iowa 458, 92 N. W. 665.

Supplemental agreement extending time of option held sale, *Fullenwider v. Rowan*, 136 Ala. 287, 34 So. 975.

Binding vendee to pay taxes during life "of the option," *Chenoweth v. Butterfield*, 11 Ariz. 315, 94 P. 1131.

Lease of machine for test, *Star etc. Co. v. McLeod*, 122 Ky. 564, 92 S. W. 558, 29 Ky. L. Rep. 84.



SEC. 109. OPTION DISTINGUISHED FROM AGREEMENT OF SALE. CASES. PENALTY, FORFEITURE AND LIQUIDATED DAMAGE CLAUSES.—Written instruments assuming the form of agreements of sale often contain penalty and forfeiture clauses. The effect to be given to such clauses depends on the facts. Where the parties mutually stipulate the seller to sell and the buyer to buy, and it is further stipulated that if the buyer fails to perform, he shall forfeit certain payments made and the agreement shall be void, the instrument should be construed as an agreement of sale, that is, as binding upon the vendee to purchase, and the forfeiture clause as a penalty and, therefore, for the sole benefit of the vendor. Otherwise it would be within the power of the vendee, by his own default, to terminate the agreement without liability to the vendor.<sup>1</sup>

Where, however, the contract provides for performance of one of two things in the alternative,

<sup>12</sup> Agreement to purchase land and pay the price when an order is obtained from the County Court to sell the same (it belonging to minors) is an agreement of sale and purchase, *Thompson v. Wilkinson*, (Okl.) 148 P. 177.

Contract between water company and village construed as a valid mutual agreement and not a mere reservation by the city to purchase, *Board of Water Commissioners of White Plains, In re*, 176 N. Y. 239, 68 N. E. 348.

<sup>1</sup> *Mason v. Caldwell*, 10 Ill. 196, 48 Am. Dec. 330; also *Hazelton v. LeDuc*, (D. C.) 10 App. Cas. 379, sale; *Westervelt v. Huiskamp*, 101 Iowa 196, 70 N. W. 125; *Hamburger v. Thomas*, (Tex. Civ. App.) 118 S. W. 770; *Wright v. Suydam*, 72 Wash. 587, 131 P. 239; *Abel v. Gill*, 95 Neb. 279, 145 N. W. 637; *Hedrick v. Firke*, 169 Mich. 549, 135 N. W. 319.

And the same rule applies to the vendor, where the agreement stipulates for liquidated damages for failure of the vendor to convey, see *Morris v. Lagerfelt*, 103 Ala. 608, 15 So. 895.

that is, when a party has the right either to perform certain acts or pay a sum of money as liquidated damages, the option right is preserved.<sup>2</sup>

A contract for the sale of land by which the vendor agrees to convey the premises, and providing that the purchaser shall comply with the "conditions" of the agreement, within a specified time or forfeit the earnest money paid, is an option.<sup>3</sup> The theory of the case was there was no agreement on the part of the vendee to purchase, and therefore, the rule applicable to bilateral contracts providing for a forfeiture or for liquidated damages if the buyer fails to perform, could not be invoked.

On the other hand, an agreement by which the vendor agrees to sell and convey to the vendee a certain tract of land, for a stated price, "and to bind the above contract, we, the above contracting

<sup>2</sup> *Davis v. Isenstein*, 257 Ill. 260, 100 N. E. 940; see *Friendly v. Elwert*, 57 Ore. 599, 105 P. 404, 112 P. 1085; *O'Neill v. Risinger*, 77 Kan. 63, 93 P. 340; *Redwine v. Hudman*, 104 Tex. 21, 133 S. W. 426.

A stipulation for liquidated damages will bar specific performance only when it appears from the contract that it was the intention of the parties that the right to pay the stipulated sum or perform the contract, should be optional, *Hedrick v. Firke*, 169 Mich. 549, 135 N. W. 319; *Grant County Board of Control v. Allphin*, 152 Ky. 280, 153 S. W. 417.

Liquidated damage and release clause held to make agreement option, *Hessell v. Neal*, 25 Colo. App. 300, 137 P. 72.

<sup>3</sup> *Runek v. Dimmick*, 51 Tex. Civ. App. 214, 111 S. W. 779; also *Gordon v. Swan*, 43 Cal. 564; *Gallup v. Sterling*, 49 N. Y. S. 942, 22 Misc. Rep. 672; *Axe v. Tolbert*, 179 Mich. 556, 146 N. W. 418; *Lawrence v. Pederson*, 34 Wash. 1, 74 P. 1011; *Low v. Young*, 158 Iowa 15, 138 N. W. 828; *Martin v. Morgan*, 87 Cal. 203, 25 P. 360, 22 A. S. R. 240; see *Beckwith-Anderson L. Co. v. Allison*, (Cal. App.) 147 P. 482.

*Libby v. Parry*, 98 Minn. 366, 108 N. W. 299, holding subsequent modification made option an agreement to purchase.

parties, deposit the sum of \$1,000 each, the same to be forfeited by the party failing to fulfill his part of the contract," and fixing a time limit of thirty days, is not an "option," but an agreement of sale and purchase.<sup>4</sup>

So, where the contract contains a forfeiture clause, but also provides that the obligation to purchase, at the price named, should continue binding, the vendee is bound, the contract not being an option.<sup>5</sup> And generally where there is an agreement on the part of the vendee to purchase, a forfeiture clause does not convert the agreement into an "option."<sup>6</sup> Nor does a stipulation that in case the optionee is not satisfied with the title, the deposit money shall be returned to him by the optionor;<sup>7</sup> but it is otherwise when, by the express

<sup>4</sup> *Newton v. Dickson*, 53 Tex. Civ. App. 429, 116 S. W. 143; see *Hedrick v. Firke*, 169 Mich. 549, 135 N. W. 319; *Gordon v. Swan*, *supra*, and also *Pringle v. Des Moines Ins. Co.*, 107 Iowa 742, 77 N. W. 521.

<sup>5</sup> *Heman v. Wade*, 140 Mo. 340, 41 S. W. 740.

<sup>6</sup> *Allison v. Coeke*, 106 Ky. 763, 51 S. W. 593, 21 Ky. L. Rep. 434; *Wright v. Snyder*, 72 Wash. 587, 131 P. 239, limiting liability to payments made; *Mound Mines Co. v. Hawthorne*, 173 Fed. 882, 97 C. C. A. 394.

The Texas Supreme Court in *Moss & Raley v. Wren*, (Tex. Civ. App.) 120 S. W. 847, reversing s. c. 113 S. W. 739, holds a contract stipulating that the purchaser on failing to comply therewith shall forfeit the amount paid which "shall be accepted by the seller as liquidated damages for such injury and damages as the seller may suffer by reason of the non-performance of the contract on the part of the purchaser," can not be specifically enforced, when the optionee availed himself of the option to terminate the contract and to forfeit the deposit money. This was the construction of the decision in *Naylor v. Parker*, 139 S. W. 93, which further holds that as the optionee in the Naylor case had elected to purchase, he was entitled to have specific performance.

<sup>7</sup> *Reynolds v. O'Neil*, 26 N. J. Eq. 223; see *Benson v. Shotwell*, 87 Cal. 49, 25 P. 249; *Haskins v. Dern*, 19 Utah 89, 56 P. 953; see also *Friendly v. Elwert*, 57 Ore. 599, 105 P. 404, 112 P. 1085.

provision of the instrument, it is stipulated, for instance, that if the purchaser does not make the payments, they are to be relieved from all liability,<sup>8</sup> or the vendor is to be relieved from all obligation to the vendee.<sup>9</sup>

SEC. 110. OPTION DISTINGUISHED FROM AGREEMENT OF SALE. CASES. PROVISIONS FOR TERMINATING AGREEMENT, ETC.—Agreements sometimes contain provisions for their termination, or stipulating that the vendor shall be released from all obligation to the vendee if the latter defaults. In these agreements the courts endeavor to give effect to the intention of the parties, and construe the agreement accordingly.<sup>1</sup> The decisions best illustrate the rule and its application.

Thus, a contract for the sale of land on a certain day, and providing “if payment is not made by said day that this contract is to be null and void” and the vendor released from all obligation to the vendee, is a mere “option” to buy the property.<sup>2</sup> So, where the contract provides that in case of

<sup>8</sup> *Verstine v. Yeane*, 210 Pa. 109, 59 Atl. 689; *Beckwith-Anderson L. Co. v. Allison*, (Cal. App.) 147 P. 482.

<sup>9</sup> *Wallace v. Figone*, 107 Mo. App. 362, 81 S. W. 492; see *Jones v. Hert*, (Ala.) 68 So. 259.

<sup>1</sup> *Abel v. Gill*, 95 Neb. 279, 145 N. W. 637, construction to make contract operative rather than void. See Sec. 122, note 8.

<sup>2</sup> *Huggins v. Safford*, 67 Mo. App. 469; *Sprague v. Schotte*, 48 Ore. 609, 87 P. 1046; *McConathy v. Lanham*, 116 Ky. 735, 76 S. W. 535, 25 Ky. L. Rep. 971; *Martin v. Wilson*, 24 Idaho 353, 134 P. 532; *Kingsley v. Kressly*, 60 Ore. 167, 118 P. 678; *Warren v. Costello*, 109 Mo. 338, 19 S. W. 29, 32 A. S. R. 669.

default on the part of the vendee the parties are to be released from all liability, the agreement is a mere "option."<sup>3</sup> A contract providing that if the defendants fail to pay a specified sum within a designated time the conveyance should be void, is only an "offer to sell."<sup>4</sup>

A written contract binding the owner of land to sell it to plaintiff for a certain sum and to execute a deed on demand on or before a fixed date, and providing that if the vendee within that time elects *not to purchase*, the contract should be null and void, is an agreement of sale.<sup>5</sup>

An agreement by an owner to sell coal lands for a certain sum per acre, and providing that, if the first payment was not made on a day named, the agreement should be construed as rescinded and neither party should be bound thereby, is an option.<sup>6</sup>

Where a vendor promises to convey land upon payment of a specified sum and the purchaser promises to pay the agreed price, mutuality is created which is not destroyed because the purchaser could terminate it by refusing to pay the interest for sixty days, since it is simply an option which

<sup>3</sup> *Pittsburg etc. Co. v. Bailey*, 76 Kan. 42, 90 P. 803; *Litz v. Goosling*, 93 Ky. 185, 9 S. W. 527, 14 Ky. L. Rep. 91, 21 L. R. A. 127, providing all obligations should cease; see *Ramsey v. West*, 31 Mo. App. 676; *Verstine v. Yeane*, 210 Pa. 109, 59 Atl. 689; *Yerkes v. Richards*, 153 Pa. 646, 26 Atl. 221, 34 A. S. R. 721.

<sup>4</sup> *Jones v. Lewis*, 89 Ark. 368, 117 S. W. 561.

<sup>5</sup> *Davis v. Wilson*, 55 Ore. 403, 106 P. 795, that is, a contract of sale, unless the purchaser elected not to buy.

<sup>6</sup> *Barnes v. Rea*, 219 Pa. 279, 68 Atl. 836.

the parties contracted for and which may or may not be exercised.<sup>7</sup>

SEC. 111. OPTION TO PURCHASE DISTINGUISHED FROM OPTION TO RETURN. BAILMENT.—The distinction between the two forms of option is that under the option to purchase, the title to the property does not pass until election, whereas, as a general rule, under an option to return, the title vests immediately in the purchaser and re-vests in the seller upon exercise of the option to return. The effect of the contract as vesting or not vesting the title in the purchaser, belongs more properly to the chapter treating of that subject.<sup>1</sup> The purpose here is to call attention to these contracts and their construction by the courts as distinguishing the one from the other. The court endeavors to ascertain the intention of the parties and to give that intention effect, irrespective of the particular name given to the contract by the parties.<sup>2</sup>

The transactions under consideration assume a variety of forms. Thus, a contract of “sale and return” or “sale or return” is a sale with option

<sup>7</sup> *Taber v. Dallas Co.*, 101 Tex. 241, 106 S. W. 332. Election not to complete purchase, option, *McGregor v. Ireland*, 86 Kan. 426, 121 P. 358.

<sup>1</sup> Chapter V, Sec. 507.

<sup>2</sup> *Scott M. & S. Co. v. Shultz & Clary*, 67 Kan. 605, 73 P. 903.

The general rule that the delivery of an article at a fixed price to be paid for or returned at the receiver's option, is a sale, yields to the express stipulation of the parties reserving title in the bailor, *Crocker v. Gullifer*, 44 Me. 491, 69 Am. Dec. 118. See, however, *In re Wells*, 140 Fed. 752.

to return,<sup>3</sup> but under an option to purchase or return there is no sale until the prospective purchaser exercises his option to purchase the property, that is, the prospective purchaser, by this form of contract, is given the option to purchase or to return.<sup>4</sup> The transaction is similar to a bailment of the property with option to purchase or return.<sup>5</sup>

Similar to the latter is the transaction whereby property is delivered to a prospective purchaser on trial or approval. However, there is much refinement shown in the interpretation of these contracts, and much ingenuity displayed in the selection of language to express the intention of the parties. Thus, an option to purchase, if one likes the property, is not a sale with option to return; it is a bailment with option to purchase.<sup>6</sup> On the other hand, a purchase of the property with option to return, if the purchaser does not like the property, is not an option to purchase the property, but is a purchase of the property with option to return if not liked.<sup>7</sup> An option to return a pur-

<sup>3</sup> State v. Betz, 207 Mo. 589, 106 S. W. 64.

An option contract of purchase or return exists where the privilege to return is not dependent upon the character or quality of the property sold, but upon the fact that the contract gives the purchaser the option to retain or return, *Sturm v. Boker*, 150 U. S. 312, 37 L. Ed. 1093, 14 S. Ct. 99.

A sale and return is a sale with the right of the buyer to return the goods at his option, *William Frantz & Co. v. Fink*, 125 La. 1013, 52 So. 131.

<sup>4</sup> State v. Betz, *supra*; *Gottlieb v. Rinaldo*, 78 Ark. 123, 93 S. W. 750, 6 L. R. A. (N. S.) 273.

<sup>5</sup> See Sec. 507, note 3.

<sup>6</sup> *Colton v. Wise*, 7 Ill. App. (Bradw.) 395.

<sup>7</sup> See *Hunt v. Wyman*, 100 Mass. 198; *Haskins v. Dern*, 19 Utah 89, 56 P. 953; *Steinhauer v. Henson*, 54 Colo. 246, 131 P. 255.

chase if the purchaser does not approve, is different from an option to purchase if the purchaser does approve; the former is a sale and delivery; the latter is a bailment which may be converted into a sale at the option of the bailee.<sup>8</sup>

SEC. 112. SAME. CASES.—An “option” given by an agreement for the transfer of corporate stock, together with the owner’s proxy as director, in consideration of a specified sum “to be considered an option,” running until a given date, when an additional sum was to be paid, or in lieu thereof all of the property delivered thereunder was to be returned, is not an option to purchase but an option to return.<sup>1</sup>

An agreement to sell conditioned on payment of a certain sum at a specified time, the prospective purchaser promising that in case of his failure to pay, to return the property delivered to him, is an option to purchase, and not a contract to pay the price or return the property.<sup>2</sup> So, where plaintiff sent rings to defendant under an agreement that defendant should keep the rings and account to plaintiff for their specified value, if she was pleased with them, otherwise that she should return them to plaintiff within a reasonable time, the agreement

<sup>8</sup> *Steinhauer v. Henson*, 54 Colo. 246, 131 P. 255.

<sup>1</sup> *Guss v. Nelson*, 200 U. S. 298, 50 L. Ed. 489, 26 S. Ct. 260, affirming s. c. 14 Okl. 296, 78 P. 170.

<sup>2</sup> *Smith v. Ivey Bros.*, 119 La. 357, 44 So. 126; *Guss v. Nelson*, *supra*, distinguished by fact that in the latter case the agreement was to pay or return; also *Wales v. Howison*, 93 Ala. 375, 9 So. 594.



was not a contract of sale *and* return, but a mere option to purchase *or* return.<sup>3</sup>

**SEC. 113. OPTION DISTINGUISHED FROM LEASE.**—A contract, in consideration of \$1, giving the privilege of entering upon land for a term of ten years to bore oil and gas wells and in the event of the discovery of oil or gas in paying quantities, to convey title to the oil, etc., for a specified royalty, the optionee agreeing to bore the wells, etc., and giving him the right of surrender and dis-

<sup>3</sup> *Gottlieb v. Rinaldo*, 78 Ark. 123, 93 S. W. 750, 6 L. R. A. (N. S.) 273.

Agreement held not to be one to return or repay money invested, but option to sell, and that offer of performance by optionee was necessary, *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53.

Option distinguished from sale with right to rescind, *Hudson v. Seeley*, 19 Cal. App. 213, 124 P. 1051.

Agreement held bailment or lease with option to purchase and not sale and purchase, *American C. & F. Co. v. Altoona & B. C. R. Co.*, 218 Pa. 519, 67 Atl. 838.

*Lambert Hoisting Engine Co. v. Carmody*, 79 Conn. 419, 65 Atl. 141.

*Cincinnati Equipment Co. v. Strang*, 215 Pa. 475, 64 Atl. 678.

Fact that price for goods has not been paid in full does not prevent return, *Ramsey v. Hessig etc. Co.*, 32 Okl. 457, 122 P. 662.

Time to return and credit on price, under option to return part of mules sold, *Loughridge v. Allen*, 18 Ky. 894, 38 S. W. 698, 18 Ky. L. Rep. 894; stock, when no time fixed, *Brooks v. Trustee Co.*, 76 Wash. 589, 136 P. 1152.

Offering to return shares as condition of maintaining action for price paid, *Boynton v. Woodbury*, 101 Mass. 346; also *Ketchum v. Alexander*, 153 N. Y. S. 864.

Tender of deed of reconveyance of land necessary to defeat recovery on note for price, *Pursley v. Good*, 94 Mo. App. 382, 68 S. W. 218.

Complaint to recover the price must allege election to return, etc., *Bovee v. Boyle*, 25 Colo. App. 165, 136 P. 467.

Failure to return as an election to purchase, see Secs. 828-830.

charge of all liability in case of non-performance, is not a "strict lease" but an option.<sup>1</sup>

An oil and gas lease granting to the lessee the right to mine for oil or gas so long as the same is producing, and royalty and rentals are paid, but which does not bind the lessee to perform any obligation, is a mere option.<sup>2</sup>

Where the defendant executed a mining lease with option to purchase and, at the same time, executed a mining deed which was deposited in escrow in a bank, together with a copy of the lease, with instructions to deliver the deed when the conditions of the lease were complied with, the option and the instruments should be construed together as parts of the same transaction, and, when so construed, must be held to be an option and not a lease.<sup>3</sup>

A contract providing that one party will "turn over" to another a certain postoffice and giving the latter an option on the "store building" and two acres upon which it is constructed, at \$300 "without rent if taken by the first of April; and if not the property is to rent for \$5 per month," is not, as to such provision, a contract of purchase

<sup>1</sup> *Pittsburg etc. Co. v. Bailey*, 76 Kan. 42, 90 P. 803; see *Owens v. Corsicana Petroleum Co.*, (Tex. Civ. App.) 160 S. W. 192.

<sup>2</sup> *Cortelyou v. Barnsdall*, 236 Ill. 138, 86 N. E. 200, s. c. 140 Ill. App. 163; *Davis v. Riddle*, 25 Colo. App. 162, 136 P. 551.

An ordinary mining lease with option to purchase does not create the relation of vendee and vendor, *Milwaukee Gold M. Co. v. Tomkins-Cristy Hardware Co.*, (Colo. App.) 141 P. 527.

<sup>3</sup> *Pollard v. Sayre*, 45 Colo. 195, 98 P. 816.

Agreement held irrevocable license where plaintiff went into possession, made improvements in mine, and incurred expenditures, *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426.

and sale, but is a contract of tenancy with option to purchase.<sup>4</sup>

A contract by which a party is to pay the owner a rent of six per cent on the cost of a building, with the privilege of becoming the owner on paying the price, creates the relation of landlord and tenant.<sup>5</sup>

A stipulation in a contract selling land that if the installments of the price are not paid the owner shall be paid rental, creates the relation of landlord and tenant with option to purchase.<sup>6</sup>

A contract reciting that the first party, in consideration of \$500 to him paid, leases to the second party, for a certain term, certain railroad cars and track, and providing that if the second party shall return them before the expiration of the term, he shall pay for the use thereof at the rate of \$200 per month till the return thereof, and giving the second party the right, at any time before returning them, to buy them at a price not exceeding \$900, is a lease with the privilege of purchase during the term, the rent not applying on the purchase price.<sup>7</sup>

A piano was leased for a certain sum payable quarterly, the lease giving the lessor an option to

<sup>4</sup> Powers v. Myers, 25 Okla. 165, 105 P. 674.

<sup>5</sup> Municipality No. 1 v. New Orleans, 5 La. Ann. 761.

<sup>6</sup> Hodnett v. Mann, 10 Ga. App. 666, 73 S. E. 1082; see also Miller v. Citizen's etc. Ass'n, 50 Ind. App. 132, 98 N. E. 70.

<sup>7</sup> Braun v. Wisconsin Rendering Co., 92 Wis. 245, 66 N. W. 196; also Ludden & Bates Southern Music House v. Dusenberry, 27 S. C. 464, 4 S. E. 60.

terminate it at any time, and the lessee an option to buy and receive credit on the price for the rent paid. The lessee, before either election is made, holds as bailee only.<sup>8</sup>

Where one delivers to another a certain amount of money with which, as his agent, to purchase live stock, and the purchase is made, the title to the stock vests in the principal, and if he agrees that the agent shall use the stock for a certain rental and further agrees that the agent may, whenever he wishes to do so, purchase the stock from the principal for the cost, with interest, the latter agreement is a lease with option to purchase and not a conditional sale.<sup>9</sup>

Other decisions on this subject will be found collected in the note.<sup>10</sup>

<sup>8</sup> *Crist v. Kleber*, 79 Pa. 290; *Wheeler & Wilson Mfg. Co. v. Heil*, 115 Pa. 487, 8 Atl. 616, 2 A. S. R. 575.

<sup>9</sup> *Evans v. Napier*, 111 Ga. 102, 36 S. E. 426.

<sup>10</sup> Offer of lease and not lease, *Giering v. Hartford T. Seminary*, 86 Conn. 208, 84 Atl. 930.

Renewal clause held not mutual, but as giving lessee option to renew, *Swank v. St. Paul City Ry. Co.*, 72 Minn. 380, 75 N. W. 594.

Lease and option therein separate agreements in sense that notice terminating lease does not defeat option, *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972.

New lease not surrender of option in original, *Lester Agricultural Chemical Wks. v. Selby*, 68 N. J. Eq. 271, 59 Atl. 247.

Renewal held to embrace option in first lease, *Pflum v. Spencer*, 108 N. Y. S. 344, 123 App. Div. 742.

Renewal of lease construed to continue option to purchase in original lease, *Madison Athletic Ass'n v. Brittin*, 60 N. J. Eq. 160, 46 Atl. 652.

Instrument held lease and not option, *Benedict v. Pincus*, 191 N. Y. 377, 84 N. E. 284; *Brewer v. Broadwood L. R.*, 22 Ch. Div. 105.

Instrument held "contract" and not lease, *City of Los Angeles v. Water Co.*, 124 Cal. 368, 57 P. 210.

**SEC. 114. OPTION DISTINGUISHED FROM AGENCY.**—The question whether a particular agreement is one giving an option to purchase, or is a mere authorization to sell for a commission, is one frequently arising. The rule, of course, here as elsewhere, is that the intention of the parties controls. A writing empowering or authorizing a real estate broker to sell land for a certain sum and binding the broker to accept, as his remuneration, any amount which he might obtain in excess of that sum, is a contract of agency and not an

<sup>10</sup> Lease with option to buy, *Wellmaker v. Wheatley*, 123 Ga. 201, 51 S. E. 436; *Grummer v. Price*, 101 Ark. 611, 143 S. W. 95; *Crawford v. Cathey*, (Ga.) 85 S. E. 127; *Powell v. Eckler*, 96 Mich. 538, 56 N. W. 1, piano; *Powell v. Plank*, 141 Mo. App. 406, 125 S. W. 836, mine, holding over optionee becomes tenant at will.

Lease, *Jarvis v. Sutton*, 3 Ind. 289; *Crinkley v. Egerton*, 113 N. C. 444, 18 S. E. 669.

Preference right to purchase, *Slaughter v. Mallet L. & C. Co.*, 141 Fed. 282, 72 C. C. A. 430.

Delivery of machine for test, sale, *Star etc. Co. v. McLeod*, 122 Ky. 564, 92 S. W. 558, 29 Ky. L. Rep. 84.

Waiver of option in lease by paying rent after election, etc., *Hartwell v. Black*, 48 Ill. 301.

Optionee in possession becomes trespasser, on expiration of option, *Henry v. Perry*, 110 Ga. 630, 36 S. E. 87.

Lease of sewing machine, with option to purchase may not be treated as sale, *Singer Sewing Machine Co. v. Independent Waist Band Mfg. Co.*, 141 N. Y. S. 488.

Apportionment of rent on exercise of option to purchase, *Withington v. Nichols*, 187 Mass. 575, 73 N. E. 855; *Church v. Standard etc. Co.*, 65 N. Y. S. 116, 52 App. Div. 407, no additional rent if optionor not able to convey good title. See Sec. 519.

Effect of exercise of option on lease, see Sec. 871.

Under extension lessee bound to pay taxes, *Wood v. Company*, 184 Mass. 523, 69 N. E. 364.

Contract between city and water company held not a lease and therefore not entitling it to take possession of the water works at the end of the 30-year period without paying or tendering the value of the plant, *City of Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368, 57 P. 210.

3—Option Contracts.

option to the broker to purchase the land.<sup>1</sup> On the other hand, a contract by the owner of land authorizing a real estate agent, within a certain time, to sell the land for a specified sum, and agreeing to pay him a commission on whatever he might realize therefrom above that amount, confers an option, which if exercised, creates between them the relation of vendor and purchaser under a contract of sale rather than the relation of principal and agent, and a sale thereunder is in the capacity of vendor on his own account and not on account of the owners.<sup>2</sup>

In another case, defendants agree that, in consideration of plaintiff's undertaking to use his best efforts to sell their land, they would transfer the land to plaintiff or his appointee, on payment of a certain sum whenever called upon to do so. This was held to be an option and not a mere authority to sell.<sup>3</sup>

Plaintiff, in consideration of \$5,000, by power of attorney, appointed M its agent to sell certain land

<sup>1</sup> *Tate v. Aitken*, 5 Cal. App. 505, 90 P. 836; see *Van Loan v. Glaze*, 11 Cal. App. 750, 106 P. 250; *Mitchel v. Gray*, 8 Cal. App. 423, 97 P. 160, not coupled with interest; *Carter v. Love*, 206 Ill. 310, 69 N. E. 85; *Raddle v. Lindemann*, 151 Ill. App. 441; *Faraday Coal Co. v. Owens*, 26 Ky. L. Rep. 243, 80 S. W. 1171, agency revoked by election to purchase; *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228; *Barbar v. Martin*, 67 Neb. 445, 93 N. W. 722; *Chezum v. Kreighbaum*, 4 Wash. 680, 30 P. 1098, 32 P. 109; *Chesbrough v. Vizard Inv. Co.*, 156 Ky. 149, 160 S. W. 725.

<sup>2</sup> *Robinson v. Easton etc. Co.*, 93 Cal. 80, 28 P. 796, 27 A. S. R. 167; see *Southack v. Lane*, 65 N. Y. S. 629, reversing 52 N. Y. S. 687, option for stated price; *Brackenridge v. Claridge*, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593; *Lawrence v. Pederson*, 34 Wash. 1, 74 P. 1011.

<sup>3</sup> *Kellow v. Jory*, 141 Pa. 144, 21 Atl. 522; see *Jolliffe v. Steele*, 9 Cal. App. 212, 98 P. 544; *Davenport v. Corbett*, 98 N. Y. S. 403, 112 App. Div. 382; see also *Hahl v. McPherson*, (Tex. Civ. App.) 133 S. W. 515; *Alger v. Keith*, 105 Fed. 105, 44 C. C. A. 371.

at any time within thirty days at a price of not less than \$500,000. It was held the agreement was not one of option but one of agency, notwithstanding the fact that, in the event of sale, the \$5,000 was to be applied on the purchase price.<sup>4</sup>

**SEC. 115. OPTION DISTINGUISHED FROM MORTGAGE OR DEED.**—Plaintiff claimed title to land under a quitclaim deed from the grantee in an instrument executed by defendants who owned the land, and which granted, bargained and sold the same on condition, among others, that on a day named they should receive \$100 per acre for the land, a certain sum in cash, and the balance in notes, and providing that, thereupon, they would deliver to such grantee, a perfect warranty deed conveying the fee, and it was held that notwithstanding the words “grant, bargain and sell” in the instrument, it was a mere option which gave the grantee or his successors no interest in the

<sup>4</sup> *Miller v. Louisville etc. R. Co.*, 83 Ala. 274, 4 So. 842, 3 A. S. R. 722.

Agreement to sell “cash on delivery of deed or one-half on time if terms can be agreed upon,” is mere option or agency and not contract of sale, *Wallace v. Figone*, 107 Mo. App. 362, 8 S. W. 492.

Agreement held to constitute selling agent with option to buy, *Burt v. Stringfellow*, (Utah) 143 P. 234; *Walter C. Reese Co. v. House*, 162 Cal. 740, 124 P. 442; *Shepard v. Pabst*, 149 Wis. 35, 135 N. W. 158.

Agreement in form of option held brokerage contract, *Axe v. Tolbert*, 179 Mich. 556, 146 N. W. 418.

Contract authorizing agent to sell and binding owner to execute conveyance and making writing irrevocable, is power of attorney, *Meek v. Hurst*, 223 Mo. 688, 122 S. W. 1022.

Contract of sale not converted into agency by supplemental agreement that any excess in price obtained should be equally divided, *Gutierrez del Arroyo v. Graham*, 227 U. S. 181, 57 L. Ed. 472, 33 S. Ct. 248.

land after the time fixed for performance had passed without performance on his part.<sup>1</sup>

A contract purporting to sell mining claims, by plaintiff to third parties, for a certain sum, to be paid on or before a certain date, and a deed purporting to convey the title to the purchasers and left in their possession, but found by the court not intended as an absolute delivery, and a reconveyance by them to plaintiff placed in escrow to be delivered to plaintiff upon failure of purchasers to make payment, all bearing the same date, are the same transaction and constitute an "option" in the third parties to purchase.<sup>2</sup>

A conveyed certain land to B and at the same time and as part of the same transaction B entered into an agreement giving A the right to repurchase within a certain time and upon certain conditions. The agreement under the circumstances was held to be an "option" and not a mortgage. The court reached this conclusion largely from the fact that there was no obligation on the part of A to repurchase, and that the amount to be paid by A, on the repurchase, was practically the entire value of the property.<sup>3</sup>

<sup>1</sup> *Dunnaway v. Day*, 163 Mo. 415, 63 S. W. 731.

The same conclusion was reached in a similar agreement in *Borst v. Simpson*, 90 Ala. 373, 7 So. 814.

<sup>2</sup> *Conway v. Hart*, 129 Cal. 480, 62 P. 44; see *Sandoval v. Randolph*, 222 U. S. 161, 56 L. Ed. 142, 32 S. Ct. 48; *White v. Bank of Hanford*, 148 Cal. 552, 83 P. 698.

<sup>3</sup> *Jeffreys v. Charlton*, 72 N. J. Eq. 340, 65 Atl. 711; *Roberts v. Norton*, 66 Conn. 1, 33 Atl. 532.

To the same effect: *Neeson v. Smith*, 47 Wash. 386, 92 P. 131; *Feudtner v. Ross*, 74 N. J. Eq. 214, 69 Atl. 190; *Whitting, Succession of*, 121 La. 501, 46 So. 606, 15 Ann. Cas. 379; *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394; *Woods v. McGraw*, 127 Fed. 914, 63 C. C. A. 556, the theory advanced was that the agreement was an extension of time to redeem.



An agreement executed by the beneficiary of a trust deed, on foreclosure, to sell the property to any one whom the optionee should direct, before a certain day, is an option and is enforceable by the optionee.<sup>4</sup>

**SEC. 116. OPTION DISTINGUISHED FROM OTHER KINDS OF CONTRACTS. MISCELLANEOUS.**—A subsequent agreement to resell the collaterals to the maker of a note, on his payment, within a certain time, of the total amount the endorser had paid out, is an option to repurchase and not a pledge.<sup>1</sup> An agreement by an applicant for a patent to a mining claim which right had been adverse by another that, in consideration of the dismissal of such adverse, he would convey when the patent was obtained, on demand and payment

<sup>3</sup> *Conner v. Clapp*, 37 Wash. 299, 79 P. 929, case where third party advanced money to "take up" option.

*Doying v. Chesebrough*, (N. J.) 36 Atl. 893, case where grantee in deed intended as mortgage gave lease with option to repurchase. See *Butt v. Bondurant*, 23 Ky. (7 T. B. Mon.) 421, option to repurchase.

In *Ensworth v. Griffiths*, 5 Bro. P. C. 184, 2 Eng. Reprint 615, distinction is pointed out between a contract originally founded upon a loan of money, for repurchase of the property mortgaged upon a certain event, and a contract made after a mortgage is entered into for absolute repurchase by the mortgagor. In the latter case the failure of the mortgagee to exercise his option right to repurchase strictly in time, cuts off his legal and equitable right. See *Jeffreys v. Charlton*, *supra*; *Neeson v. Smith*, *supra*; *Owens v. Williams*, 130 N. C. 165, 41 S. E. 93.

<sup>4</sup> *Alston v. Connell*, 140 N. C. 485, 53 S. E. 292.

<sup>1</sup> *Cantwell v. Johnson*, 236 Mo. 575, 139 S. W. 365; see *Sayward v. Houghton*, 119 Cal. 545, 51 P. 853, 52 P. 44.

Option is personal property and the subject of pledge, *Ringling v. Smith River Dev. Co.*, 48 Mont. 467, 138 P. 1098.

of a certain amount, did not create a trust but was an "option."<sup>2</sup>

But when plaintiff received a deed for property upon an agreement at the time of the execution of the deed that he would convey the land to defendant to whom the vendor had agreed to give an option, on the payment by defendant of a certain consideration, a parol trust was created in favor of defendant, enforceable against plaintiff, as trustee of the legal title.<sup>3</sup>

<sup>2</sup> *Stevens v. McChrystal*, 150 Fed. 85.

Duty of trustee giving option to get best price, *Callaway v. Hubner*, 99 Md. 529, 58 Atl. 362.

See *Beulah Marble Co. v. Mattice*, 22 Colo. 547, 45 P. 432, not partnership.

<sup>3</sup> *Sykes v. Boone*, 132 N. C. 199, 43 S. E. 645, 95 A. S. R. 619.

An option in the purchaser to pay or to refuse to pay for the property is not essential to a conditional sale, *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435, but see *Andrews v. Colorado Sav. Bank*, 20 Colo. 313, 36 P. 902.

Option to secure purchaser and not option to purchase, *Hale v. Triest*, 134 N. Y. S. 673, 150 App. Div. 166.

Loan with option, *Bangs v. Nordheimer*, 66 Barb. (N. Y.) 627.

Agreement for termination or renewal of partnership, *Floyd v. Storrs*, 144 Mass. 56, 10 N. E. 743.

Option on water, etc., works and plants: *City of Indianapolis v. Gas Co.*, 144 Fed. 640, 75 C. C. A. 442; *Quinby v. Gas Co.*, 140 Fed. 362; *City and County of Denver v. New York Trust Co.*, 229 U. S. 123, 57 L. Ed. 1101, 33 S. Ct. 657, reversing 187 Fed. 890, 11 C. C. A. 224; *Montgomery Gaslight Co. v. City*, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616; *City of Los Angeles v. Water Co.*, 124 Cal. 368, 57 P. 210; *Town of Southington v. Company*, 80 Conn. 646, 69 Atl. 1023; *Valparaiso City Water Co. v. Valparaiso*, 33 Ind. App. 193, 69 N. E. 1018; *Overall v. Madisonville*, 125 Ky. 684, 102 S. W. 278, 31 Ky. L. Rep. 278, 12 L. R. A. (N. S.) 433, lighting plant; *Rockport Water Company v. Rockport*, 161 Mass. 279, 37 N. E. 168; *Mayo v. Dover etc. Fire Co.*, 96 Me. 539, 53 Atl. 62; *Farmington Village Corp. v. Farmington W. Co.*, 93 Me. 192, 44 Atl. 609; *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497; *Town of Bristol v. Waterworks*, 25 R. I. 189, 55 Atl. 710; *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219, 69 P. 176; *Connor v. City of Marshfield*, 128 Wis. 280, 107 N. W. 639; *Town of Boonton v. United Water Supply Co.*, 83 N. J. Eq. 536, 91 Atl. 814.

**SEC. 117. OPTION TO TERMINATE CONTRACT.**—A continuing contract may contain a provision making it terminable at the option of one, or either of the parties, and such provision is valid and when exercised will be enforced by the courts if not contrary to equity and good conscience.<sup>1</sup>

There is a class of contracts like those for supplying gas and other commodities in which the time limit is not specified. These contracts are construed by the courts as running for a reasonable time and as terminable by either party upon giving reasonable notice.<sup>2</sup>

A contract reserving the right to one of the parties to terminate it when he becomes dissatisfied, ordinarily implies that the party must have reasonable grounds for so doing,<sup>3</sup> but this rule does not apply, it seems, where the term is left indefinite.<sup>4</sup>

<sup>1</sup> *Morrissey v. Broomal*, 37 Neb. 766, 56 N. W. 383.

<sup>2</sup> *McCullough-Dalzell C. Co. v. Philadelphia Co.*, 223 Pa. 336, 72 Atl. 633; *Victoria L. Co. v. Hinton*, 166 Ky. 674, 161 S. W. 1109.

<sup>3</sup> *Clark v. Kelley*, (Iowa) 109 N. W. 292.

*Gould v. McCormick*, 75 Wash. 61, 134 P. 676, 48 L. R. A. (N. S.) 765, Ann. Cas. 1915A, 710, discharge of architect employed to superintend construction of building to entire satisfaction of employer, holding when it is doubtful if contract gives right to discharge for good cause or arbitrarily the former construction will be adopted, citing *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 A. S. R. 422, and *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 A. S. R. 398.

The rule is that contracts containing alternative stipulation will be construed strictly in favor of the party bound, *Kolachny v. Galbreath*, 26 Okla. 272, 110 P. 902.

When the right to discharge is reserved in the contract of employment the master may discharge before the expiration of the term of employment if in good faith he is not satisfied with the services rendered, *Bridgeford & Co. v. Meagher*, 144 Ky. 479, 139 S. W. 750.

<sup>4</sup> *Victoria L. C. v. Hinton*, 156 Ky. 674, 161 S. W. 1109.

The exercise of a right to terminate is not a breach of the contract,<sup>5</sup> and the party terminating is not entitled to damages, the other party not being in default,<sup>6</sup> unless, of course, the contract contemplates and provides for an adjustment of the rights and liabilities of the parties,<sup>7</sup> or for the payment of a sum on notice of termination.<sup>8</sup>

A contract covering a period of time but containing a condition that it may be terminated before that time, will remain effective for the full term, unless the condition of termination is fully complied with.<sup>9</sup> Where, therefore, a particular notice, or a specified time, is required to make the notice effective, a notice not conforming to the contract, or not given at the time specified, does not have the effect of terminating the contract.<sup>10</sup> With reference to mutuality, it would seem the rule

<sup>5</sup> *Over v. Byram Foundry Co.*, 37 Ind. App. 452, 77 N. E. 302.

<sup>6</sup> *Walton etc. Co. v. McKittrick*, 141 Ky. 415, 132 S. W. 1046.

<sup>7</sup> *Harlow v. Oregonian Pub. Co.*, 45 Ore. 520, 78 P. 737, contract for newspaper route.

<sup>8</sup> *Ward v. American Health Food Co.*, 119 Wis. 12, 96 N. W. 388, advertising contract in street cars, holding that there was no termination because the specified amount was not paid at the time of notice to terminate.

<sup>9</sup> *Home Ins. Co. v. Hamilton*, 143 Mo. App. 237, 128 S. W. 273.

A contract which is terminable at the will of either party on reasonable notice, is obligatory upon the parties so long as they continue to act under it, that is, until termination, *Kenny v. Knight*, 119 Fed. 475.

<sup>10</sup> *Cedar Rapids & I. C. Ry. & L. Co. v. Chicago R. I. & P. Ry. Co.*, 145 Iowa 528, 124 N. W. 323, a contract affecting third persons; *Mayo H. & Co. v. Phil. T. M. Co.*, 105 Va. 486, 53 S. E. 967; *McClelland v. McLemore*, (Tex. Civ. App.) 70 S. W. 224, 3 days' notice to terminate building contract.

*Brown v. Raisin Mon. Co.*, 98 Md. 1, 55 Atl. 391, holding Sundays should not be counted in computing the 10 days' time, suspension during which worked a termination of the contract to remove tar.

is that unless the option to terminate the contract is reserved to either party, it is lacking in that essential. Thus, a contract between a railroad company and a telephone company which gives the latter the privilege of placing telephones in two depots, of the former, in consideration of free telephone service for it, but subject to termination at the will of one, with the stipulation that no corresponding right shall be exercised by the other, lacks mutuality.<sup>11</sup>

A provision in a contract employing a baseball player for the season of 1913 and obligating him to contract to render similar services for the employer during the year 1914, when the employer by the contract was entitled to terminate it at any time on ten days' notice, is void for want of mutuality.<sup>12</sup>

But a contract whereby one, in consideration of a release of a claim for damages against him, agrees to employ the claimant at certain wages so long as the works of the former are kept running, or until the employee shall see fit to quit, is not void, either for indefiniteness of term employed, or for want of mutuality.<sup>13</sup>

<sup>11</sup> *Great N. Ry. Co. v. Sheyenne T. C.*, 27 N. D. 256, 145 N. W. 1062, suit for equitable relief by injunction; see also *American A. C. Co. v. Kennedy*, 103 Va. 171, 48 S. E. 868.

There is no lack of mutuality when the contract gives the purchaser of real estate the option to rescind for breach of condition, or waive the condition, *Catholic F. M. Soc. v. Oussani*, 215 N. Y. 1, 109 N. E. 80.

<sup>12</sup> *Wheeghan v. Killefer*, 215 Fed. 168, *affd.* 215 Fed. 289; *American L. B. C. v. Chase*, 149 N. Y. S. 6; *Brooklyn B. C. v. McGuire*, 116 Fed. 782; *Cincinnati Exhibition Co. v. Marsans*, 216 Fed. 269, *injunction*; *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 51 Atl. 973; *Metropolitan Exhibition Co. v. Ewing*, (C. C.) 42 Fed. 198, 7 L. R. A. 381, *injunction*; see Sec. 1115.

<sup>13</sup> *Carter White Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536.

## SEC. 118. ALTERNATIVE STIPULATION.

—The rule is that where one of the parties to a contract obligates himself to do one of two things on the performance of a certain act by the other, the one making such alternative promise has the right to elect which alternative he will perform, provided he makes such election before he is in default; but if he fails to make such election in time, then the promisee may elect which alternative he will accept.<sup>1</sup> Thus, an agreement by A to deliver to B from 700 to 1,000 barrels of meal, gives A the right to deliver any number of barrels from 700 to 1,000.<sup>2</sup> An agreement by A to pay B \$8 per acre for land in two separate payments, and in case of default in payment, then \$9 per acre at a further specified time, gives A the option right to pay the \$3 per acre at the fixed time, or \$9 per acre at the subsequent specified time.<sup>3</sup> A written promise to pay a certain sum in one year for a clock, “or interest on the same and the clock uninjured,” gives the promisor an election to pay the money or deliver the clock and pay the interest.<sup>4</sup> A contract by A to deliver to B all the lambs of a flock sold B, for a certain time and price, the amount to be cred-

<sup>1</sup> *Kramer v. Ewing*, 10 Okl. 357, 61 P. 1064; also *Patchin v. Swift*, 21 Vt. 292; *Collins v. Whigham*, 58 Ala. 438, also holding an election once made is irrevocable; *Markall v. Ferguson*, 23 Cal. 65; *Childs v. Fischer*, 52 Ill. 205; *Phillips v. Cornelius* (Miss.), 28 So. 871.

If one of the alternatives becomes impossible or can not be legally performed, then the other must be performed, *Rosenthal v. Perkins*, 123 Cal. 240, 55 P. 804.

<sup>2</sup> *Disborough v. Neilson*, 3 Johns. Cas. (N. Y.) 81; also *White v. Toney*, 9 Leigh (Va.) 347; *Illinois Glass Co. v. Three States L. Co.*, 90 Ill. App. 599.

<sup>3</sup> *Smith v. Sanborn*, 11 Johns. (N. Y.) 59.

<sup>4</sup> *Barker v. Jones*, 8 N. H. 413.

ited on the note executed by A for the purchase price when the sheep are sold, was intended to provide a manner for paying the note in lambs instead of money and it was optional with A to pay the note either in money or lambs.<sup>5</sup> Where a debtor has the election to pay either in money or property, within a certain time, and he fails to exercise the option and make a tender at the time fixed, he loses his option and the seller has the right to demand the money.<sup>6</sup>

An agreement to lease provided that plaintiff, a new tenant, should be entitled to take the fixtures on the premises, at their appraised value, or to purchase them direct from the old tenant, and that, at the expiration of the lease, plaintiff would buy the fixtures from him. Under this agreement the new tenant was bound to purchase the fixtures, his only option being as to the mode of purchase.<sup>7</sup> A contract for the payment of a certain sum of money in specified articles does not give the debtor an election to deliver the articles at the prices specified, or to pay the sum in money, but requires the delivery of the specified articles.<sup>8</sup>

A contract stipulating that, in consideration of described personal property delivered by the purchaser to the vendor, the latter shall execute and deliver a deed to the purchaser of real estate described, and providing for a return of the personal property if the vendor shall fail or refuse,

<sup>5</sup> Longfellow v. Huffman, 57 Ore. 388, 112 P. 8.

<sup>6</sup> Haskins v. Dern, 19 Utah 89, 56 P. 953, holding the contract is not one of bailment.

<sup>7</sup> Street v. Chicago W. & S. Co., 157 Ill. 605, 41 N. E. 1108.

<sup>8</sup> Wilson v. George, 10 N. H. 445.

from any cause, to execute and deliver the deed, does not give the vendor the right to elect whether to return the personal property or execute a deed, but requires him to return the personal property when his failure to convey is justified, and the contract is in form subject to specific performance.<sup>9</sup>

Where a person covenants with another to pay a certain sum of money or return a bond when called for by the latter, he is unconditionally bound to pay the money if the latter does not exercise his privilege of calling for the bond.<sup>10</sup>

A contract by a father to restore a daughter to her mother or, for failure so to do, to become liable to the mother in a certain sum as stipulated damages, does not give the father the option to pay the penalty, or rid himself of the obligation, where tendering the penalty he was bound, by the contract, to pay costs of legal proceedings by the mother to obtain the child.<sup>11</sup>

If, by the terms of an agreement, an option is reserved to one party to determine or to consummate it as a contract, the law will give a like option to the other party until both are bound; then it becomes a binding contract. Thus, defendant agreed to purchase from a manufacturer all the lumber of a certain description that he should manufacture until defendant should notify him to discontinue the cutting, and the manufacturer agreed to sell such lumber at specified prices, and it was

<sup>9</sup> Redwine v. Hudman, 104 Tex. 21, 133 S. W. 426.

<sup>10</sup> Ramsey v. Waltham, 1 Mo. 395.

<sup>11</sup> Dittrich v. Gobey, 119 Cal. 599, 51 P. 962.



held that either party could terminate the agreement before any lumber of such description had been manufactured as until then it was binding on neither, but after the manufacture of such lumber had commenced, it was binding on both.<sup>12</sup>

A party to a contract giving alternative rights, who exercises his right of choice and makes an election, is concluded thereby under a determination by election at law, though under a determination by election in equity a mere acceptance does not conclusively evidence election. But where a party to an unambiguous contract which gives him alternative rights, elects one of the rights, he can not rescind his election merely because he regrets he did not select the other, or because he had forgotten the terms of the contract which he did not read, and which he had the opportunity of reading, at the time of his election.<sup>13</sup>

The doctrine of relation applies to alternative stipulations and, consequently, the rights of the parties will attach as against third parties with notice and as between themselves as of the time of making the contract.<sup>14</sup>

**SEC. 119. OPTION TO MATURE CHATTEL MORTGAGE.**—The right to foreclose a chattel mortgage does not arise until the debt secured thereby matures, unless by virtue of a special provision in the mortgage giving the mortgagee the

<sup>12</sup> McIntyre L. & E. Co. v. Jackson L. Co., 165 Ala. 268, 51 So. 767.

<sup>13</sup> Twaits v. Penn. R. Co., 77 N. J. Eq. 103, 75 Atl. 1010.

<sup>14</sup> Collins v. Whigham, 58 Ala. 438.

option to accelerate the maturity of the debt upon breach, by the mortgagor, of some stipulation of the mortgage, on his part, usually the non-payment of interest or an installment of the principal, and sometimes arbitrarily when the mortgagee deems himself insecure.<sup>1</sup> Upon such breach or default taking place, the common form of chattel mortgage provides that the mortgagee may take immediate possession of the property and sell it either under the power of sale contained therein or under foreclosure proceedings by suit. We are concerned here only with the option feature of the mortgage.

A clause providing for accelerating the maturity of a debt at the option of the mortgagee in the following cases is held by the courts to be valid: in case an execution is levied on the property by a third person;<sup>2</sup> default in payment of the sum secured, or of any installment thereof, or the removal of the mortgaged chattels without the written consent of the mortgagee, and providing that the mortgagee may take possession in such cases

<sup>1</sup> *Corrigan v. Sammis*, 120 N. Y. S. 69, and *Abramson v. Potts*, 125 N. Y. S. 1012, cases where clause in mortgage payable in installments giving the mortgagee the right to foreclose upon default in payment of the "said sum," was construed as not accelerating the maturity by default in payment of installment of the sum.

In *Gernert v. Lembach*, 163 Ala. 413, 50 So. 903, where the mortgage secured several notes and provided that if the mortgagor failed to pay each of the notes promptly at maturity, the mortgagee upon default in the payment of the note first maturing, was authorized to take possession and sell under the power of sale therein, the default and election maturing all the notes; also *Gavin v. Matthews*, 152 N. C. 195, 67 S. E. 478.

<sup>2</sup> *Gaar v. Centralia First Nat'l Bank*, 20 Ill. App. 611; *Dice v. Irvin*, 110 Ind. 561, 11 N. E. 488; *Wilson v. Roundtree*, 72 Ill. 570; *Wells v. Chapman*, 59 Iowa 658, 13 N. W. 841, *attachmex*.

without notice;<sup>3</sup> in the payment of an interest installment;<sup>4</sup> when the mortgagee deems himself insecure;<sup>5</sup> default in payment of taxes or assessments.<sup>6</sup>

The privilege of accelerating the maturity of the debt, however, is one for the sole benefit of the mortgagee and, consequently, the mortgagor can not, by his default, force the mortgagee to exercise the right, or otherwise work maturity of the debt.<sup>7</sup> The privilege being one for the sole benefit of the mortgagee, the maturity of the debt is not accelerated unless he exercises the privilege in due time and if he fails to do so, he waives the right as to the particular default.

## SEC. 120. OPTION TO MATURE DEBT SECURED BY REAL ESTATE MORTGAGE.—A debt to secure the payment for which a mortgage is

<sup>3</sup> *Baumann v. Cornez*, 8 N. Y. S. 480; *Fulgham v. Morris*, 75 Ala. 245, installment; *Maddox v. Wyman*, 92 Cal. 674, 28 P. 838, installment; *Chapin v. Whitsett*, 3 Colo. 315, one of several notes; *Brink v. Freoff*, 40 Mich. 610; installment; *Clark v. Baker*, 6 Mont. 153, 9 P. 911; *Richardson v. Coffman*, 87 Iowa 121, 54 N. W. 356, renewal.

<sup>4</sup> *Coad v. Home Cattle Co.*, 32 Neb. 761, 49 N. W. 757, 23 A. S. R. 465.

<sup>5</sup> *Woods v. Gaar S. & Co.*, 93 Mich. 143, 53 N. W. 14; *Cole v. Shaw*, 103 Mich. 505, 61 N. W. 869; *Evans v. Graham*, 50 Wis. 450, 7 N. W. 380; *Robinson v. Gray*, 90 Iowa 699, 57 N. W. 614; *Newlean v. Olson*, 22 Neb. 717, 36 N. W. 155, 3 A. S. R. 286; *Rieh v. Milk*, 20 Barb. (N. Y.) 616; *Humpfner v. D. M. Osborne & Co.*, 2 S. D. 310, 50 N. W. 88, holding power not absolute and arbitrary; also *Nash v. Larson*, 80 Minn. 458, 83 N. W. 451, 81 A. S. R. 272; *Wertz v. Bernard*, 32 Okl. 426, 122 P. 649.

See, however, to the contrary, *Huebner v. Kœbke*, 42 Wis. 319.

<sup>6</sup> *Jones v. Norton*, 136 Ga. 835, 72 S. E. 337.

<sup>7</sup> *Kelly v. Bogardus*, 51 Mich. 522, 16 N. W. 885.

*Central Fruit Co. v. Worcester Cycle Mfg. Co.*, 110 Fed. 491, creditor of mortgagor can not interpose defense that suit was brought to foreclose prematurely.

given, is now quite uniformly evidenced by the note of the mortgagor. The mortgage being a security for payment of the debt, the maturity of the debt fixes the time when the mortgagee is entitled to foreclose his mortgage in the event default in payment is made. In the absence of an "interest" clause, or some similar clause,<sup>1</sup> maturing the debt, it does not mature prior to the time fixed, by reason of default in the payment of an interest installment maturing prior to that time.<sup>2</sup> A custom, however, has grown up of inserting, either in the note or in the mortgage, or in both, a provision to the effect that if default shall be made in payment of any interest installment maturing during the term of the mortgage, the mortgagee shall have the right, at his election, to declare the principal sum immediately due and payable.

Such a clause has been sustained as valid and legal as against the objection that it creates a penalty, or forfeiture, the courts placing their decisions upon the ground that the effect of such clause is merely to allow the mortgagee the privilege,

<sup>1</sup> As to tax clauses see *Brockway v. McClun*, 148 Ill. App. 465, *affd.* 90 N. E. 374, trust deed; *Pearmain v. Mass. H. L. Ins. Co.*, 206 Mass. 377, 92 N. E. 497.

In *French v. Poole*, 83 Kan. 281, 111 P. 488, mortgage construed as requiring default in both tax and interest clauses in order to mature debt.

<sup>2</sup> *Kirk v. Van Petten*, 38 Fla. 335, 21 So. 286; *Hinton v. Jones*, 136 N. C. 53, 48 S. E. 546; *Rowe v. Griffiths*, 57 Neb. 488, 78 N. W. 20; *Sweeney v. Kaufman*, 168 Ill. 233, 48 N. E. 144.

When the interest clause is in the trust deed and not in the note secured thereby, the note is not affected as to date of maturity by the terms of the trust deed, except for the purpose of enforcing the security, *Board of Trustees v. Piersol*, 161 Mo. 270, 61 S. W. 811, trust deed.

See, however, *Castor v. Muramoto*, 69 Wash. 145, 125 P. 153.

at his election, of accelerating the maturity of the debt.<sup>3</sup> The debt, however, is not *ipso facto* matured upon default in payment of interest. The clause becomes effective only in the event the mortgagee exercises the privilege.<sup>4</sup> In other words, if the mortgagee fails to exercise the privilege within a reasonable time after the due date of a particular unpaid interest installment, he is said to have lost his right to declare the mortgage debt due because of that particular default.

An election under such a clause starts the statute of limitations running; otherwise, notwithstanding a default in the payment of interest, the statute does not begin to run until the expiration of the period fixed by the mortgage for the payment of the mortgage debt,<sup>5</sup> and this rule applies where

<sup>3</sup> *Curran v. Houston*, 201 Ill. 442, 66 N. E. 228; *Connecticut Mut. L. Ins. Co. v. Westerhoff*, 58 Neb. 379, 78 N. W. 724, 79 N. W. 731, 76 A. S. R. 101; *First National Bank v. Peck*, 8 Kan. 660; *Swearinger v. Lahner*, 93 Iowa 147, 61 N. W. 341, 26 L. R. A. 765, 57 A. S. R. 261; *Hawkinson v. Banaghan*, 203 Mass. 591, 89 N. E. 1054; *Taber v. Cincinnati L. & C. Ry. Co.*, 15 Ind. 459; *Gore v. Davis*, 124 N. C. 234, 32 S. E. 554; *Warren v. Harrold*, 92 Tex. 417, 49 S. W. 364, trust deed; *Hockett v. Burns*, 90 Neb. 1, 132 N. W. 718, not against public policy; *Bizzel v. Roberts*, 156 N. C. 272, 72 S. E. 378.

In some states there is a statute maturing the debt for default in interest payment, *Perry v. Fisher*, 30 Ind. App. 261, 65 N. E. 935; see *Bank v. Doherty*, 29 Wash. 233, 69 P. 732, 92 A. S. R. 903.

<sup>4</sup> *McCarthy v. Benedict*, 89 Neb. 293, 131 N. W. 598.

<sup>5</sup> *Richards v. Daley*, 116 Cal. 336, 48 P. 220; *Watts v. Hoffman*, 77 Ill. App. 411; *Keene etc. Bank v. Reid*, 123 Fed. 221, 59 C. C. A. 225; *Sherwood v. Wilkins*, 65 Ark. 312, 45 S. W. 988; *First National Bank v. Park*, 37 Colo. 303, 86 P. 106; *Insurance Co. of North America v. Martin*, 151 Ind. 209, 51 N. E. 361; *Kennedy v. Gibson*, 68 Kan. 612, 75 P. 1044; *Watts v. Creighton*, 85 Iowa 154, 52 N. W. 12; *Weinberg v. Naher*, 51 Wash. 591, 99 P. 736; *Moline Plow Co. v. Webb*, 141 U. S. 616, 35 L. ed. 879, 12 S. Ct. 100; *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207.

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there is an election and the default is waived, or cured, by subsequent payment.<sup>6</sup>

An interest clause does not affect the negotiability of the mortgage note,<sup>7</sup> unless it is exercised,<sup>8</sup> but the note is rendered non-negotiable when the payee is given the right to declare the money due whenever he deems himself insecure,<sup>9</sup> or for default in payment of taxes.<sup>10</sup>

SEC. 121. SAME. EXERCISE OF OPTION. WAIVER.—This option to be effective must be exercised by the mortgagee and within a reasonable time after default, or the right to declare the mortgage debt due is waived.<sup>1</sup> What is a reasonable time seems to be relative to the facts and circumstances.<sup>2</sup> In particular cases of great hardship to the mort-

<sup>6</sup> Cal. Sav. & L. Co. v. Culver, 127 Cal. 107, 59 P. 292, case where suit to foreclose was filed and then dismissed.

<sup>7</sup> Hunter v. Clarke, 184 Ill. 158, 56 N. E. 297, 75 A. S. R. 160; Mackintosh v. Gibbs, 81 N. J. L. 577, 80 Atl. 554; Schmidt v. Pegg, 172 Mich. 159, 137 N. W. 524; *Contra*, Bell v. Riggs, 34 Okl. 834, 127 P. 427, 41 L. R. A. (N. S.) 111.

<sup>8</sup> Stark v. Olsen, 44 Neb. 646, 63 N. W. 37; Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958; Mackintosh v. Gibbs, 81 N. J. L. 577, 80 Atl. 554.

<sup>9</sup> First National Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604; Carroll Co. Sav. Bk. v. Strother, 28 S. C. 504, 6 S. E. 313; Morgan v. Edwards, 53 Wis. 599, 11 N. W. 21, 40 Am. Rep. 781.

<sup>10</sup> Bright v. Offield, 81 Wash. 442, 143 P. 159.

<sup>1</sup> Julien v. Model Bldg. L. & Inv. Co., 116 Wis. 79, 92 N. W. 561, 61 L. R. A. 668, case where it was held mortgagee waived notice by changing his place of residence, etc., without giving mortgagor notice of change of residence or P. O. address.

<sup>2</sup> Washburn v. Williams, 10 Colo. App. 153, 50 P. 223; Farnsworth v. Hoover, 66 Ark. 367, 50 S. W. 865; Swearingen v. Lahner, 93 Iowa 147, 61 N. W. 431, 57 A. S. R. 261, 26 L. R. A. 765.

gagor, the court sometimes relieves him from the default.<sup>3</sup>

It is held that the bringing of a suit to foreclose the mortgage,<sup>4</sup> or the advertisement of the property under power of sale,<sup>5</sup> is sufficient notice of election to treat the whole mortgage debt due, and that, therefore, previous notice is not necessary, unless, of course, the mortgage provides for a particular notice, or a specified time for making the election.<sup>6</sup>

The privilege is one for the sole benefit of the mortgagee and since the exercise of the right to accelerate the maturity of the debt is optional with him, the maturity is not accelerated unless he elects to do so.<sup>7</sup> Where, therefore, he does not elect, the debt does not mature until the period fixed by the

<sup>3</sup> *Provident Sav. Life Assur. Soc. v. Georgia Industrial Co.*, 124 Ga. 399, 52 S. E. 289; *Condon v. Maynard*, 71 Md. 601, 18 Atl. 957; *Serrell v. Rothstein*, 49 N. J. Eq. 385, 24 Atl. 369.

<sup>4</sup> *Bank of Commerce v. Seofield*, 126 Cal. 156, 58 P. 451; *Sweeney v. Kaufman*, 168 Ill. 233, 48 N. E. 144; *National Life Ins. Co. v. Butler*, 61 Neb. 449, 85 N. W. 437, 87 A. S. R. 462; *Kilpatrick v. Germania Life Ins. Co.*, 183 N. Y. 163, 75 N. E. 1124, 2 L. R. A. (N. S.) 574, 111 A. S. R. 722; *Mullen v. Gooding I. & H. Co.*, 20 Idaho 348, 118 P. 666.

<sup>5</sup> *Lee v. Security Bk. & Tr. Co.*, 124 Tenn. 582, 139 S. W. 690, trust deed.

<sup>6</sup> *Chicago etc. R. Co. v. Fosdick*, 106 U. S. 47, 21 L. Ed. 47, 1 S. Ct. 10; *Lauterjung v. Chicago T. & T. Co.*, 156 Ill. App. 621; *Potomac Mfg. Co. v. Evans*, 84 Va. 717, 6 S. E. 2; *Doolittle v. Nurnberg*, 27 N. D. 521, 147 N. W. 400.

<sup>7</sup> *Lowenstein v. Phelan*, 17 Neb. 429, 22 N. W. 561.

*Gunby v. Ingram*, 57 Wash. 97, 106 P. 495, tender before election. Citing *Coman v. Peters*, 52 Wash. 574, 100 P. 1002, as deciding that whether there be words of option or not, the maturity of the debt is not hastened without an election, the clause not being self-executing.

mortgage. The privilege being optional, it is held the mortgage may waive the default or breach, and also an election made, and that he does so when he receives payment from the mortgagor of a past due interest installment;<sup>8</sup> and it is also held that a default is cured and the right of election is barred where, before election, the mortgagor tenders the amount due.<sup>9</sup> Waiver of a prior default does not affect the right of the mortgagee to exercise the option privilege as to a subsequent default when the mortgage provides that he may declare the whole amount due and foreclose "at any default."<sup>10</sup>

**SEC. 122. INTERPRETATION. RULES OF CONSTRUCTION.**—The purpose is to give some of the more important of the general rules and to illustrate them, as far as possible, by decisions involving option contracts.

<sup>8</sup> *Belloc v. Davis*, 38 Cal. 242; *Mason v. Luce*, 116 Cal. 232, 48 P. 72; *Crossmore v. Page*, 73 Cal. 213, 14 P. 787; *Fletcher v. Dennison*, 101 Cal. 292, 35 P. 868; *Kinsell v. Ballou*, 151 Cal. 754, 91 P. 620; *Hecker v. Boylan*, 126 Iowa 162, 101 N. W. 755, note; *Farmers & M. Bk. v. Daiker*, 153 Iowa 484, 133 N. W. 705.

The holder of a mortgage security may rescind an election to declare the principal sum due and dismiss a bill for foreclosure, even as to a surety, when the mortgage specifically provides for rescission, *Philadelphia Sav. Fund Soc. v. Lasher*, 144 Ill. App. 653.

<sup>9</sup> *Clark v. Paddock*, 24 Idaho 142, 132 P. 795, 46 L. R. A. (N. S.) 475; *Stalder v. Riverside G. & W. Co.*, 167 Cal. 560; 140 P. 252, holding maker may tender before receipt of notice of exercise of option; *Weinberg v. Naher*, 51 Wash. 591, 99 P. 736; see *Matzger v. Page*, 62 Wash. 170, 113 P. 254.

<sup>10</sup> *Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299; *Industrial L. Dev. Co. v. Post*, 55 N. J. Eq. 559, 37 Atl. 892.



The cardinal rules of construction are:

(a) The contract must be so construed as to give effect to the common intention of the parties.<sup>1</sup>

(b) The intention of the parties is to be gathered from the whole contract.<sup>2</sup>

(c) And the clear and unambiguous terms of the contract govern the court in ascertaining the intention.<sup>3</sup>

<sup>1</sup> *Jorgensen v. Tuolumne County*, 205 Fed. 612, 123 C. C. A. 628; *Cummings v. Nielson*, 42 Utah 157, 129 P. 619; *Brown v. Beckwith*, 60 Fla. 310, 53 So. 542; *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341, 8 N. E. 654, 27 Am. Rep. 729; *Newbern Banking Co. v. Duffy*, 153 N. C. 62, 68 S. E. 915; *Radell v. Sharlan*, 66 Wis. 138, 28 N. W. 136; *Wallis v. First Nat'l Bank*, 155 Wis. 306, 143 N. W. 670; *Tilton v. Sterling Coal etc. Co.*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689, regardless of literal interpretation; *Pratt v. Prouty*, 104 Iowa 419, 73 N. W. 1035, 65 A. S. R. 472; *Ross v. Savage*, 66 Fla. 106, 63 So. 148.

<sup>2</sup> *Caine v. Hagenbarth*, 37 Utah 69, 106 P. 945; *Carnegie Natural Gas Co. v. Oil Company*, 56 W. Va. 402, 49 S. E. 548; *Taylor v. Buffalo Collieries Co.*, 72 W. Va. 353, 79 S. E. 27; *Pittsburg Steel Co. v. Wood*, 109 Ark. 537, 160 S. W. 519; *McGraw v. Hanway*, 120 Md. 197, 87 Ark. 666; *Hathaway v. Stone*, 215 Mass. 212, 102 N. E. 461; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26.

*Barnes v. Rea*, 219 Pa. 279, 68 Atl. 836, holding that whether a particular instrument should be construed as an absolute conveyance, or as an agreement to sell, or as an option to purchase, does not, as a rule, depend upon any particular words or phrases but upon the intention of the parties derived from the instrument itself by a consideration of all its parts, and where that is doubtful, from the attending circumstances. See, also, *Aiple etc. Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652.

<sup>3</sup> See *Miller v. St. Paul F. & M. Ins. Co.*, 26 S. D. 454, 128 N. W. 609; *Lee v. Cochran*, 157 Ala. 311, 47 So. 581.

*Baraboo Land etc. Co. v. Winter*, 130 Wis. 457, 110 N. W. 413, fact that plaintiff was not the owner, that possession was not delivered and that there was an "enormous" price, are by themselves immaterial.

In applying these rules the courts have laid down the following subsidiary rules:

(d) Several contracts relating to the same subject matter, made between the parties, and involving the same transaction, will be considered together.<sup>4</sup>

(e) The words of the contract are to be given their ordinary and popular meaning except when

<sup>3</sup> Written lease deemed to embody whole agreement in absence of fraud or mistake, *Abbott v. 76 Land Co.*, 101 Cal. 567, 36 P. 1, 53 P. 445, option in lease not implied.

Oral negotiations merged in option which is regarded as the exclusive medium of ascertaining the agreement of the parties, *Fox v. Danargo L. Co.*, 37 Colo. 203, 86 P. 433; *Carson v. Redding*, 52 Colo. 178, 120 P. 147.

<sup>4</sup> Prior option may be referred to to determine intention of parties to lease when language ambiguous, *Chicago Auditorium Ass'n v. Corp. Fine Arts Bldg.*, 244 Ill. 532, 91 N. E. 665, *affd.* 150 Ill. App. 262.

*Burt v. Stringfellow*, (Utah) 143 P. 234, first option and extension; *Standiford v. Kloman*, 234 Pa. 443, 83 Atl. 311, option and extension; *Lechner v. Strauss*, 50 Ind. App. 414, 98 N. E. 444, option and extension.

Option and lease construed as one transaction, *Pollard v. Sayre*, 45 Colo. 195, 98 P. 816; *Snider v. Yarbrough*, 43 Mont. 203, 115 P. 411; see *Conway v. Hart*, 129 Cal. 480, 62 P. 44.

Terms of option to be determined from correspondence and not from formal contract executed by bank depositary without authority, *Tyng v. Constant Elec. Co.*, 37 Utah 304, 108 P. 1109.

Deed and option agreement construed as one contract, *Myers v. Metzger*, 61 N. J. Eq. 522, 48 Atl. 1113.

Option and lease not same transaction, *Broadway Hospital and Sanitarium v. Decker*, 47 Utah 586, 92 P. 445.

Agency to sell and option to purchase, *Sixta v. Land Co.*, 157 Wis. 293, 147 N. W. 1042.

Parol evidence is not admissible to connect one writing with another, as constituting one transaction; the connection must appear from the face of the papers, *Broadway Hospital and Sanitarium v. Decker*, *supra*; *Tippins v. Phillips*, 123 Ga. 415, 51 S. E. 410.

used in a technical sense<sup>5</sup> and except, also, when, by usage, they have acquired a special meaning.<sup>6</sup>

(f) When the contract is susceptible of two constructions that one will be adopted which will render the contract valid.<sup>7</sup>

(g) The contract will, if possible, be construed so as to make it reasonable, equitable, and operative rather than unreasonable, inequitable, or not operative.<sup>8</sup>

<sup>5</sup> See *Ross v. Savage*, 66 Fla. 106, 63 So. 148; *Thompson v. Craft*, 238 Pa. 125, 85 Atl. 1107.

Words must be given their ordinary meaning; absurdity avoided if possible, *Cummings v. Nielson*, 42 Utah 157, 129 P. 619; *E. H. Stanton Co. v. Rochester etc. Agency*, 206 Fed. 978; *Carnegie N. Gas Co. v. Oil Co.*, 56 W. Va. 402, 49 S. E. 548; *Scudder v. Perce*, 159 Cal. 429, 114 P. 571.

The use of the word "option" upon particular facts, excludes the idea of an absolute agreement of purchase, *Gard v. Thompson*, 21 Idaho 485, 123 P. 497; "sell" construed as meaning "offer to sell"; *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 596.

"Refusal" construed to mean option, *Wellmaker v. Wheatley*, 123 Ga. 201, 51 S. E. 436; *Callahan v. Michael*, 45 Ind. App. 215, 90 N. E. 642; *Potts v. Whitehead*, 21 N. J. Eq. 55, *affd.* 23 N. J. Eq. 512.

Reference in pleading to instrument as "option" does not make it such when it lacks the essentials of an option, *Comstock Bros. v. North*, 88 Miss. 754, 41 So. 374.

<sup>6</sup> *Findley's Exrs. v. Findley*, 11 Grat. (Va.) 434; *Wayne v. The General Pike*, 16 Ohio 421.

<sup>7</sup> *Hammond v. Haskell*, 14 Cal. App. 522, 112 P. 575; *Saunders v. Clark*, 29 Cal. 299; *Rapp v. Linebarger & Son*, 149 Iowa 429, 128 N. W. 555; *Rice v. Lincoln & N. W. R. Co.*, 88 Neb. 307, 129 N. W. 425, involving perpetuity; *Lewis v. Tipton*, 10 Ohio St. 88, 75 Am. Dec. 498; *Lippert v. Garrick Theatre Co.*, 144 Wis. 413, 129 N. W. 409.

<sup>8</sup> *Stein v. Archibald*, 151 Cal. 220, 90 P. 536.

Instrument construed as a lease and option in order to protect the rights of the parties, *Gilbert v. Port*, 28 Ohio St. 276; to make it operative, *Abel v. Gill*, 95 Neb. 279, 145 N. W. 637; construed to make it equitable rather than unreasonable, where ambiguous, *Caine v. Hagenbarth*, 37 Utah 69, 106 P. 945; *McMillan v. Phila. Co.*, 159 Pa. 142, 28 Atl. 220.

(h) In case of doubt the court will, in proper cases, follow the construction placed upon the contract by the parties<sup>9</sup> and likewise, in case of doubt, the court will construe the words of the contract most strongly against the party who used them in the preparation of the contract.<sup>10</sup>

<sup>8</sup> Where option is plain and unambiguous, it can not be construed to relieve party from consequences claimed by him hard and unfair, *Lee v. Cochran*, 157 Ala. 311, 47 So. 581; however, if option is not plain and unambiguous, if two constructions, that will be adopted which is fair and reasonable rather than one which results in injustice, *Lechner v. Strauss*, 50 Ind. App. 414, 98 N. E. 444; *Paine v. Copper etc. Co.*, 13 Ariz. 406, 114 P. 964; *Redwine v. Hudman*, 104 Tex. 21, 133 S. W. 426; *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558, 27 Ky. L. Rep. 724; *Christian Feigenspan v. Popowska*, 75 N. J. Eq. 342, 72 Atl. 1003.

<sup>9</sup> *Tilton v. Sterling C. & C. Co.*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689; *Pittsburg V. P. & B. Brick Co. v. Bailey*, 76 Kan. 42, 90 P. 803; *Abel v. Gill*, 95 Neb. 279, 145 N. W. 637; *Pratt v. Prouty*, 104 Iowa 419, 73 N. W. 1035, 65 A. S. R. 472; *Stone v. Powell*, (Iowa) 150 N. W. 15; *Shaw v. Caldwell*, 16 Cal. App. 1, 115 P. 941.

Construed as an agreement (lease) when so treated by the parties, *Benedict v. Pineus*, 191 N. Y. 377, 84 N. E. 284; see *O'Connor v. Harrison*, 132 Ill. App. 264; *Standiford v. Thompson*, 135 Fed. 991, 68 C. C. A. 425, option; *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558, 27 Ky. L. Rep. 724.

Evidence not admissible to show construction by parties when intention can readily be ascertained from written option, *Lawrence v. Pederson*, 34 Wash. 1, 74 P. 1011; see *Pittsburg V. P. & B. Brick Co. v. Bailey*, *supra*.

<sup>10</sup> *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171, printed form; *Lechner v. Strauss*, 50 Ind. App. 414, 98 N. E. 444; *Wier v. Am. Locomotive Co.*, 215 Mass. 303, 102 N. E. 481; *Brown v. Beckwith*, 60 Fla. 310, 53 So. 542; *Moorefield v. Fidelity Mut. Life Ins. Co.*, 135 Ga. 186, 69 S. E. 119; *L'Engle v. Overstreet*, 61 Fla. 653, 55 So. 381; *Paine v. Copper etc. Co.*, 13 Ariz. 406, 114 P. 964.

Rule does not apply to grant of franchise by city for waterworks by ordinance reserving option to city to purchase, *Valparaiso City W. Co. v. Valparaiso*, 33 Ind. App. 193, 69 N. E. 1018.

(i) Where there is a conflict between the printed and the written matter of the contract, the latter controls.<sup>11</sup>

(j) The meaning of general words and the scope of general clauses will be restricted by the more specific.<sup>12</sup>

(k) The contract is to be interpreted according to the law and usage of the place where it is to be performed, if indicated, otherwise according to the law of the place where it was made.<sup>13</sup>

SEC. 123. INTERPRETATION. RULES OF EVIDENCE.—Proof of the contract itself necessarily precedes its interpretation by the court. Such proof having been made and its validity established, there is no room for interpretation, or construction, if the language of the contract is

<sup>11</sup> Hardy v. Ward, 150 N. C. 385, 64 S. E. 171.

Seaver v. Thompson, 189 Ill. 158, 59 N. E. 553, option in lease, but of course this rule is subordinate to the controlling rule that the intention of the parties must prevail, John v. Elkins, 63 W. Va. 158, 59 S. E. 961.

<sup>12</sup> Taylor v. Buffalo Collieries Co., 72 W. Va. 353, 79 S. E. 27; Scudder v. Perce, 159 Cal. 429, 114 P. 571.

<sup>13</sup> An option to purchase land in Louisiana and performed in that state, is governed by the laws of Louisiana, Kirby etc. Co. v. Burnett, 144 Fed. 635, 75 C. C. A. 437; Horvitz v. Fredson, 178 Ill. App. 303, where made.

Construction of agreement containing penalties or forfeiture clauses:  
See Sec. 109.

As being offer or option, Secs. 103-107.

As being option or sale, Secs. 108-110.

As being sale or return, Secs. 111-112.

As being lease or option, Sec. 113.

As being agency or option, Sec. 114.

As being deed, etc., or option, Sec. 115.

plain and unambiguous, for the general rule is that parol evidence is not admissible to contradict, vary, add to, or subtract from, the terms of such a written contract.<sup>1</sup> There are, however, what are called exceptions to the rule, the more important of which allow the introduction of parol evidence as follows:

(a) To show the invalidity of the contract,<sup>2</sup> or a contingency or condition affecting its creation, operation or effect.<sup>3</sup>

- 1 Where not ambiguous parol evidence not admissible, *Chicago Aud. Ass'n v. Corp. Fine Arts Bldg.*, 244 Ill. 532, 91 N. E. 665; *Pollard v. Sayre*, 45 Colo. 195, 98 P. 816; *Richardson v. Hardwick*, 106 U. S. 252, 27 L. Ed. 145, 1 S. Ct. 213, payment; *Newell v. Lamping*, 45 Wash. 304, 88 P. 195; *Pratt v. Prouty*, 104 Iowa 419, 73 N. W. 1035, 65 A. S. R. 472; *Broadway H. & S. v. Decker*, 47 Wash. 586, 92 P. 445, statute of frauds.

In the absence of fraud, mistake or ambiguity, parol evidence is not admissible to vary the terms of a written contract, *Haskins v. Dern*, 19 Utah 89, 56 P. 953; *Kelly v. Chicago etc. Ry. Co.*, 93 Iowa 436, 61 N. W. 957.

This rule applies to legal effect of the contract, as where time of election, payment or performance is not expressly fixed, parol evidence is not admissible to show an agreement for a particular time, *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88; *Willard v. Tayloe*, 8 Wall (U. S.) 557, 19 L. Ed. 501; *Standard Box Co. v. Mut. Biscuit Co.*, 10 Cal. App. 746, 103 P. 938; *Hawkins v. Studdard*, 132 Ga. 265, 63 S. E. 852.

Rule does not apply to third parties, *Shields Bros., In re*, 134 Iowa 559, 111 N. W. 963, 10 L. R. A. (N. S.) 1061, or to consideration for option; *Horn v. Hansen*, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617.

All antecedent and contemporaneous oral agreements are merged in the written contract, *Kelly v. Chicago etc. Ry. Co.*, 93 Iowa 436, 61 N. W. 957.

- 2 *Barrett v. Davis*, 104 Mo. 549, 16 S. W. 377; *Curry v. Colburn*, 99 Wis. 319, 74 N. W. 778, non-delivery.

- 3 *Lyons v. Stills*, 97 Tenn. 514, 37 S. W. 280, to show option to rescind sale, in suit on note for price.

*Whitaker v. Salisbury*, 32 Mass. 534, *eserow*.

See *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978, to hold grantor in deed trustee.

(b) To prove mistake or fraud as the basis for equitable relief.<sup>4</sup>

(c) To prove a distinct, valid, contemporaneous, oral agreement, not in conflict with the provisions of the written agreement in certain cases.<sup>5</sup>

<sup>3</sup> *Stanton v. Singleton*, (Cal.) 54 P. 587, signature of another party.

But this rule does not apply to the enforcement of a forfeiture clause in the contract, *Stevinson v. Joy*, 164 Cal. 279, 128 P. 751, or to mere offers, *Weiden v. Woodruff*, 38 Mich. 130.

In the absence of fraud or mistake parol evidence is not admissible to show that notes containing an unconditional promise to pay the principal were executed under an agreement that they were not to be binding, *Stewart v. Gardner*, 152 Ky. 120, 153 S. W. 3.

<sup>4</sup> *Somerville v. Coppage*, 101 Md. 519, 61 Atl. 318; *Beach v. Bellwood*, 104 Va. 170, 51 S. E. 184; *Kee v. Davis*, 137 Cal. 456, 70 P. 294, 671; *Bush v. Merriman*, 87 Mich. 260, 49 N. W. 567.

<sup>5</sup> Where option is not ambiguous and contains nothing as to time and manner of payment, it will be presumed that payment of price and delivery of deed are concurrent acts and parol evidence is not admissible to show an agreement for the payment of earnest money, not complied with, *Kibler v. Caplis*, 140 Mich. 28, 103 N. W. 531, 112 Am. Rep. 388.

Admissible to show a parol agreement that neither one of two options should be enforced unless the purchaser should carry out the other, *Reynolds v. Hooker*, 76 Vt. 184, 56 Atl. 988.

Also to determine whether payment of price is a part of the act of election, *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441.

Also that dividends on optioned stock were not to pass, *Rivers v. Oak Lawn Sugar Co.*, 52 La. Ann. 762, 27 So. 118.

But not to show omission of clause applying rentals, *Braun v. Wisconsin R. Co.*, 92 Wis. 245, 66 N. W. 196.

Not to show a contemporaneous oral agreement to take back articles and repay price sold by bill of sale, *Fales v. McKeon*, 2 Hilt. (N. Y.) 53.

Not admissible to show option in lease intended by the parties as contract of sale, *Smith v. Caldwell*, 78 Ark. 333, 95 S. W. 467, or that the option was unconditional, *Devitt v. Kaufman Co.*, 27 Tex. Civ. App. 332, 66 S. W. 224, or that the option was given for the purpose of authorizing the optionee to sell the property to a third person, *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 115 A. S. R. 880, 5 L. R. A. (N. S.) 1194.

(d) To identify the parties and the subject matter.<sup>6</sup>

(e) To introduce a custom or usage into the contract where permissible<sup>7</sup> and to prove the meaning of words and phrases in proper cases.<sup>8</sup>

<sup>5</sup> See *Hazelton v. LeDuc*, (D. C.) 19 App. Cas. 379, understanding of optionee as option.

Oral agreement as to securities, *Fletcher v. Painter*, 81 Kan. 195, 105 P. 500.

To show transaction mortgage of option, *Connor v. Clapp*, 37 Wash. 299, 79 P. 929, 931.

To show what is reasonable time, *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541.

But not where time is fixed, *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165.

<sup>6</sup> Parol evidence admitted to identify property, *Langert v. Ross*, 1 Wash. 250, 24 P. 443; *Wellmaker v. Wheatley*, 123 Ga. 201, 51 S. E. 436; *Easton v. Thatcher*, 7 Utah 99, 25 P. 728; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37; *Gaylord v. McCoy*, 158 N. C. 325, 74 S. E. 321; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555.

*Joyce v. Tomasini*, 168 Cal. 234, 142 P. 67, State and County not given, also uncertain as to location of right of way.

To identify adjoining piece of land, *Heyward v. Willmarth*, 84 N. Y. S. 75, 87 App. Div. 125; reference to lease not permissible, *Broadway H. & S. v. Decker*, 47 Wash. 586, 92 P. 445.

*Easton v. Thatcher*, 7 Utah 99, 25 P. 728, description; parol evidence admitted to apply contract to subject matter.

*Barnes v. Husted*, 219 Pa. 287, 68 Atl. 839, parol evidence not admissible to supply description; or to connect letter containing description with option contract, *Tippins v. Phillips*, 123 Ga. 415, 51 S. E. 410, or to supply lot numbers in blank space left unfilled, (rule as to patent ambiguities) *Marske v. Willard*, 169 Ill. 276, 48 N. E. 290.

As to mistake, reformation, etc., see Sec. 217; *Butler v. Threlkeld*, 117 Iowa 116, 90 N. W. 584.

<sup>7</sup> *Lillard v. Kentucky etc. Co.*, 134 Fed. 168, 67 C. C. A. 74; *J. J. Moore Co. v. United States*, 196 U. S. 157, 49 L. Ed. 428, 25 S. Ct. 202.

<sup>8</sup> *Nonantum Worsted Co. v. North Adams Mfg. Co.*, 156 Mass. 331, 31 N. E. 293; *Licking Rolling Mills Co. v. W. P. Snyder & Co.*, 28 Ky. L. Rep. 357, 89 S. W. 249.



(f) Generally to show the circumstances attending and surrounding the execution of the contract including the situation of the parties and of the subject matter, to place the court in the position of the parties and thus enable the court to ascertain the true meaning and intent of the parties<sup>9</sup> but not for the purpose of varying, etc., the terms of the contract.<sup>10</sup>

<sup>9</sup> *Stein v. Archibald*, 151 Cal. 220, 90 P. 536; *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541, 543; *Curtin v. Ingle*, 137 Cal. 95, 69 P. 836; *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171.

Extrinsic evidence of surrounding circumstances and facts, of the relation of the parties, and of the purpose sought to be accomplished, is admissible to aid the court to determine whether an instrument is a sale or an option, *Caine v. Hagenbarth*, 37 Utah 69, 106 P. 945; *Low v. Young*, 158 Iowa 15, 138 N. W. 828; *McHenry v. Mitchell*, 219 Pa. 297, 68 Atl. 729.

See *Collier v. Robinson*, (Tex. Civ. App.) 129 S. W. 389, evidence not admissible to show contract optional.

Admissible to show whether sum named in option contract is penalty or liquidated damages, *Kinkaid v. Levy*, 151 Mo. App. 352, 131 S. W. 757.

<sup>10</sup> *Dugan v. Kelly*, 75 Ark. 55, 86 S. W. 831; *Jersey Island Dredging Co. v. Whitney*, 149 Cal. 269, 86 P. 691; *Wells v. Gress*, 118 Ga. 566, 45 S. E. 418; *Chambers v. Prewitt*, 172 Ill. 615, 50 N. E. 145; *Ransdel v. Moore*, 153 Md. 393, 53 N. E. 767, 53 L. R. A. 753; *Citizens Bank v. Brigham*, 61 Kan. 727, 60 P. 754; *Lee v. Carter*, 52 La. Ann. 1453, 27 So. 739; *Alvord v. Cook*, 174 Mass. 120, 54 N. E. 499; *Gregory v. Village of Lake Linden*, 130 Mich. 368, 90 N. W. 29; *Calloway v. Henderson*, 130 Mo. 77, 32 S. W. 34, description; *Oliver v. Oregon Sugar Co.*, 42 Ore. 276, 70 P. 902; *Richardson v. Planters Bank*, 94 Va. 130, 26 S. E. 413.

Evidence of what took place before or after the execution of the option is not admissible to vary its terms, *Sirk v. Ela*, 163 Mass. 394, 40 N. E. 183.

To show real consideration or want of consideration when not required by Statute of Frauds to be expressed, see Sec. 331.

Statements by secretary of corporation as to extension, etc., admissible against corporation, *Abbott v. 76 Land Co.*, 87 Cal. 323, 25 P. 693.

SEC. 124. INTERPRETATION. MISCELLANEOUS.—A lease provided the tenant should have the privilege of purchasing the premises at any time within four years, for a specified sum, and that if the landlord did not dispose of the premises before the expiration of the term of the lease, the tenant might have a renewal on the same terms and conditions, and it was held that the instrument must be construed as providing that if the lessor did not dispose of the premises before the expiration of the term, the tenant should, at his option, have a renewal, but that the lessor could not exercise his reserved right of disposal within the four years without first giving the tenant an opportunity to purchase.<sup>1</sup>

A clause in an oil lease giving the lessee “the option to drill the well or not, or pay said rental or not, as he may elect,” construed as requiring the lessee to dig a well or pay the rent.<sup>2</sup>

A clause in a lease giving the lessee “the opportunity” to purchase the leasehold estate “upon terms and conditions” fixed by lessor, merely binds the lessor to notify the lessee of his decision to sell giving the lessee his “terms and condition,” and

<sup>1</sup> *Elston v. Schilling*, 42 N. Y. 79; see *Schroeder v. Gemeinder*, 10 Nev. 355.

Court leans against construction for perpetual renewal of leases, *Baynham v. Guy's Hospital*, 3 Ves. Jun. 295, 30 Eng. Reprint 1019; *Moore v. Foley*, 6 Ves. Jun. 232, 31 Eng. Reprint 1027.

*Devitt v. Kaufman County*, 27 Tex. Civ. App. 332, 66 S. W. 224, holds on the facts that optionee had no right to purchase unless the optionor elected to terminate the lease by making a sale.

<sup>2</sup> *McMillan v. Phila. Co.*, 159 Pa. 142, 28 Atl. 220.

Option construed to cover bonds first described and not other bonds referred to in option, *Martyn v. Hitchings*, 192 Mass. 71, 78 N. E. 380.

does not require the lessor to find a third person to make the offer.<sup>3</sup>

A provision in a lease that the lessee may buy the land "at the option of the parties" means that the lessee may buy it at his own option.<sup>4</sup>

A contract giving defendants an option to purchase and take sand and gravel from plaintiffs' land, was held not to give them an irrevocable right, but merely to entitle them to at least \$1,000 worth.<sup>5</sup>

A covenant to convey when the covenantor "should find a purchaser" becomes obligatory when the covenantor finds some person who is able and willing to pay the covenantor's price and to purchase the property.<sup>6</sup>

In a contract by which defendant agrees to sell to plaintiff certain sheep and lambs on certain conditions, defendant renewed an option for ten days to sell the lambs to third parties and the contract provided that at the expiration of the ten days, the lambs could be sold only to plaintiff, and it was held that the contract did not give defendant an

<sup>3</sup> *Chandler & Co. v. McDonald-Weber Co.*, 215 Mass. 365, 102 N. E. 319, distg. *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555.

Agreement construed as giving an option to buy and not option to sell, *Cummings v. Town of Lake Realty Co.*, 86 Wis. 382, 57 N. W. 43.

<sup>4</sup> *Mack v. Dailey*, 67 Vt. 90, 39 Atl. 686.

Clause in lease construed as giving lessee alone right to renew, *Swank v. St. Paul Ry. Co.*, 72 Minn. 380, 75 N. W. 594.

<sup>5</sup> *Stebbins v. Myers*, 143 N. Y. S. 296.

An option agreement providing that a church should have the option to buy a lot and that the lot should not be sold by the optionor unless plaintiff should be constrained by circumstances requiring such sale, means any cause requiring sale and not merely financial causes, *Smyth v. Nelson*, 135 Ga. 96, 68 S. E. 1032.

<sup>6</sup> *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25.

option, after not selling to third persons, to refuse to sell to plaintiff.<sup>7</sup>

A testator devised lands to his children equally, to be amicably divided by them, and, if possible, W. J. to take a certain 40 acres. If they could not agree to such partition, and the premises had to be sold, he directed that W. J. should have the first right to purchase the 40 acres "at the price at which it may be appraised, or at such price as may be agreed upon." Held, that W. J. had the right to purchase the 40 acres at the appraised value whether or not the other heirs would pay more for the same tract.<sup>8</sup>

The general rule is that conditions precedent to the exercise of the option rights must be strictly complied with, but whether a particular provision amounts to a condition precedent depends on the intention of the grantor gathered from the whole instrument and existing facts.<sup>9</sup>

<sup>7</sup> Rothrock v. Hunter, 66 Wash. 543, 119 P. 1114.

<sup>8</sup> Snyder v. Snyder, 75 Iowa 255, 39 N. W. 297.

<sup>9</sup> Frank v. Stratford-Handcock, 13 Wyo. 37, 77 P. 134, 67 L. R. A. 571, 110 A. S. R. 963, making deposit.

Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380, holding courts will incline against construing a repurchase clause in a deed as a condition.

## CHAPTER II.

### FORM AND VALIDITY.

- Sec. 201. Essentials of option contract.
- Sec. 202. Parties. Generally.
- Sec. 203. Parties. Executor. Guardian. Donee.
- Sec. 204. Parties. Agent. Authority and liability of.
- Sec. 205. Parties. Agent. Authority and liability of, continued.
- Sec. 206. Parties. Tenants in common. Joint tenants.
- Sec. 207. Parties. Homestead and dower right of wife.
- Sec. 208. Formal requisites.
- Sec. 209. Terms and provisions must be definite and certain.
- Sec. 210. Terms and provisions must be definite and certain. Price.
- Sec. 211. Terms and provisions must be definite and certain. Price fixed by offer of third parties, etc.
- Sec. 212. Terms and provisions must be definite and certain. "Refusals." Preference right to purchase, etc.
- Sec. 213. Terms and provisions must be definite and certain. Arbitration, valuation and appraisal clauses.
- Sec. 214. Description.
- Sec. 215. Legality and validity.
- Sec. 216. Futures.
- Sec. 217. Mistake, fraud, etc.
- Sec. 218. Time limit. Perpetuities.
- Sec. 219. Perpetuities. Common law rule. The Gomm decision.
- Sec. 220. Perpetuities, continued. The Starcher Brothers decisions.
- Sec. 221. Perpetuities, continued. Rule under Statutes providing against suspension of power of alienation.
- Sec. 222. Perpetuities. Rule where no time limit is expressly fixed by the option.
- Sec. 223. Perpetuities. Leases and like instruments.
- Sec. 224. Perpetuities. Option for life or for term of years.

SEC. 201. ESSENTIALS OF OPTION CONTRACT.—The formal essentials of a valid option contract differ in no respect from those of any other contract. There must be an offer to sell a right of election, whether it be one to purchase, to sell, to deliver, to return, or otherwise. The offer must be accepted and the option agreement concluded.<sup>1</sup> The option must be supported by a consideration, or, in some jurisdictions, it is sufficient if it is under seal. The option contract thus raised must be in the form required by law. The parties must be competent in law to make a valid contract and their assent thereto must be free from fraud, duress, undue influence, and mistake. In addition to these the object of the contract must be legal. The consideration to support the option and the Statute of Frauds are subjects which will be discussed in separate chapters. The other matters will be presented in the following sections of this chapter.

SEC. 202. PARTIES. GENERALLY. —It is not the intention to discuss here the competency of parties to enter into an option contract, beyond saying that the test is the same for an option as for any other contract.

The competency of the parties being assumed, the inquiry naturally arises as to the authority or power of a party to grant or sell an option privilege.

<sup>1</sup> Negotiations which are not concluded, or which are broken off by the parties, do not give rise to an option contract, *Bradford v. Haas*, 111 La. 148, 35 So. 493.

The decisions exhibit four classes of cases: First, those where the party is the sole owner in his own right; secondly, those where the party is a joint tenant, tenant in common, or partner; thirdly, those where the party is acting in a representative capacity such as executor, trustee, etc.; and fourthly, those where the party acts through an agent.

The right of a party of the first class to grant or sell an option privilege is undoubted. The only question ever raised bearing even remotely on this point, is the invalidity of the option contract, a subject which is discussed elsewhere in this chapter.<sup>1</sup> The power and authority of the other classes will be found presented in the following sections of this chapter.<sup>2</sup>

SEC. 203. PARTIES. EXECUTOR. GUARDIAN.—It is said in a North Carolina case<sup>1</sup> that in respect to the personal estate of the testator, the title to which vests in the executors jointly, one of

<sup>1</sup> See Sec. 215.

<sup>2</sup> Joint optionees sustain fiduciary relations and equity, in a proper case, will protect the right of the one against the other, *Merritt v. Joyce*, 117 Minn. 235, 135 N. W. 820. But on failure to pay the price either optionee is at liberty to take a new option excluding the others from its benefits, *Commercial Bank v. Weldon*, 148 Cal. 601, 84 P. 171.

Power of City to take and consent to extension of option, see *Gathright v. H. M. Byllesby*, 154 Ky. 106, 157 S. W. 45.

An instrument signed by defendant setting forth that she agreed to sell to E and plaintiff "or either of them," certain land is fatally defective, since it showed no definite purchaser, being at most an offer to sell to either of the persons named, *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485.

<sup>1</sup> *Trodgen v. Williams*, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867.

*Clay v. Rufford*, 5 DeG. & Sm. 768, 64 Eng. Reprint 1337, holds that a donee of a power of sale can not give a future option.

them may sell or dispose of it; but that the rule is different where a power to sell land is conferred upon two executors. In such case they must join in the sale and in the execution of the deed. The same case also holds that a power to sell real estate conferred on the executor does not include the power to execute an option contract, and a later case holds that the executor has no such power when he is not vested with power to sell.<sup>2</sup>

Another case holds that an executor is not authorized to give an option on lands belonging to the estate as against the next of kin, although it appears to be an advantage to the estate.<sup>3</sup>

In another North Carolina case it is held that an option contract, by a guardian, to sell his ward's real estate, without any authority from the Court to enter into such a contract, is contrary to public policy and void.<sup>4</sup>

An administrator of the lessee under a lease which provides for renewal only at the option of the lessee, on a valuation of the land only, the improvements belonging to the lessee, and making no provision for compensation therefor, if there was no renewal, can not bind the estate by renewal.<sup>5</sup>

<sup>2</sup> *Hedgecock v. Tate*, (N. C.) 85 S. E. 34.

<sup>3</sup> *Oceanic Steam Nav. Co. v. Sutherland*, 16 Ch. Div. 236, 15 L. J. Ch. 308, 43 L. T. 743, 29 W. R. 813.

<sup>4</sup> *LeRoy v. Jacobosky*, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977, and also holds that where lack of authority to do so was known by optionee, the latter had no action for breach.

<sup>5</sup> *Chisholm v. Toplitz*, 82 N. Y. S. 1081, 82 App. Div. 346, *affd.* 178 N. Y. 599, 70 N. E. 1096.



An executor may be directed by the Court to sell testator's property subject to an existing lease giving the lessee an option to purchase at the end of the term, when the lease does not prohibit a sale during the term.<sup>6</sup>

SEC. 204. PARTIES. AGENT. AUTHORITY AND LIABILITY OF.—The right of a party to negotiate and give an option contract himself personally or through the agency of some other person, is common place law. Where, however, the contract falls within the provisions of the statute of frauds the authority of the agent to act for the principal must be evidenced by writing in accordance with the provisions of that statute.<sup>1</sup>

Whether a particular contract is an option, or a mere agency to sell, is presented in another place.<sup>2</sup> The decisions exhibited here are those dealing with the power and authority of the agent and the rights, duties and liabilities growing out of the relation of principal and agent.<sup>3</sup>

A power of attorney authorizing the agent to "superintend my real and personal estate, to make contracts . . . and generally to do all things that

<sup>6</sup> In *re Brannan's Estate*, (Cal.) 51 P. 320; see, however, *Magruder v. Hornot*, 110 La. 585, 34 So. 696.

<sup>1</sup> See Sec. 407.

<sup>2</sup> See Sec. 114.

An optionee as such has no authority to act as agent of the owner, *Raymer v. Hobbs*, (Cal. App.) 146 P. 906.

<sup>3</sup> Agent selling merchandise has no implied authority to give the purchaser an option to return any goods he might subsequently buy from the principal, *Ide v. Brody*, 156 Ill. App. 479.

concern my interest in any way, real or personal whatsoever," gives the agent power to execute a lease of real estate containing an option to purchase the leased land.<sup>4</sup>

A power of attorney merely to sell land implies that the agent shall sell for cash and he can not sell on credit in the absence of authority contained in the power of attorney.<sup>5</sup>

One dealing with an agent acting under a power of attorney is taken to deal with the power spread out before him and must inspect it to see whether the agent's act is authorized by the power; one dealing with a special agent does so at his peril.<sup>5</sup>

A power of attorney may fix the limit of time within which the agent is to do the act and where it fixes a reasonable time for doing an act, it must be done by the agent within a reasonable time in order to bind the principal.<sup>5</sup>

A broker and member of the chamber of commerce of a city who receives from another an order to purchase a quantity of wheat for the latter, has authority to execute the order according to the usage and custom of the business.<sup>6</sup>

<sup>4</sup> DeRutte v. Muldrow, 16 Cal. 505.

<sup>5</sup> Dyer v. Duff, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339.

<sup>6</sup> Van Dusen-Harrington Co. v. Jungeblut, 75 Minn. 298, 77 N. W. 970, 74 A. S. R. 463.

A contract signed by a person with the addition to his signature of "agent," is the contract of the person signing, Pearson v. Horne, 139 Ga. 453, 77 S. E. 387.

General manager of corporation where money is paid to him under lease and option is turned over by him to corporation and retained by it, West v. Washington etc. R. Co., 49 Ore. 436, 90 P. 666.

SEC. 205. PARTIES. AGENT. AUTHORITY AND LIABILITY OF, CONTINUED. — An agent authorized to give an option can not appoint a sub-agent for whose services the principal will be liable.<sup>1</sup>

Where the owner of land gave a written option to a broker for a given time and at a given price, by the terms of which the broker was constituted the agent of the owner to sell the land on commission, the agent can not buy for himself at the price named.<sup>2</sup> Nor can an agent to buy, purchase from himself, although the conduct of the agent is not fraudulent.<sup>3</sup>

The general rule is that the authority of the agent to sell at a fixed price does not empower him to give an option to purchase.<sup>4</sup>

Another well-established rule is, that an agent employed to sell or find a purchaser, has not performed the contract by negotiating a mere option contract, and therefore, is not entitled to recover

<sup>1</sup> *Sorenson v. Smith*, 65 Ore. 78, 129 P. 757.

<sup>2</sup> *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246.

<sup>3</sup> *Montgomery v. Hundley*, 205 Mo. 138, 103 S. W. 527.

<sup>4</sup> *Swift v. Erwin*, 104 Ark. 459, 148 S. W. 267; *Field v. Small*, 17 Colo. 386, 30 P. 1034; *Jenkins v. Locke*, 3 App. D. C. 485; *Wynkoop v. Shoemaker*, 37 App. D. C. 258; *Ide v. Brody*, 156 Ill. App. 479, option to return; *Glass v. Rowe*, 103 Mo. 513, 15 S. W. 334.

*Trodgen v. Williams*, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867, executor's power under will.

*Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 A. S. R. 977, 2 Ann. Cas. 421, power of co-agent.

from the principal the agreed, or any, compensation for such services.<sup>5</sup>

An agent employed to procure an option contract is not entitled to recover commissions from the principal for procuring an agreement to purchase.<sup>6</sup>

An agent employed to procure an option for the purchase of property who obtains the same in his own name upon an oral understanding between him and the optionor that the option was procured for the employer, is the agent of the employer who is entitled to the benefit of the option.<sup>7</sup> And so where a broker is employed to purchase land and

<sup>5</sup> *Fox v. Denargo L. Co.*, 37 Colo. 203, 86 P. 344; *McGonigal v. Rangleley*, 6 Pennewill (Del.) 1, 63 Atl. 801, withdrawal of option; *Martin v. Wilson*, 24 Idaho 353, 134 P. 532; *Ramsey v. West*, 31 Mo. App. 676; *Ward v. Zborowski*, 63 N. Y. S. 219, 31 Misc. Rep. 66; *Benedict v. Pincus*, 191 N. Y. 377, 84 N. E. 284; *Brackenridge v. Claridge*, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593; *Runck v. Dimmick*, 51 Tex. Civ. App. 214, 111 S. W. 779; *Lawrence v. Pederson*, 34 Wash. 1, 74 P. 1011; *Kinney v. Eckenberger*, (Wash.) 145 P. 665; *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 A. S. R. 977, 2 Ann. Cas. 421; *Scott v. Merrill's Estate*, (Ore.) 146 P. 99.

<sup>6</sup> *Giles v. Swift*, 170 Mass. 461, 49 N. E. 737.

Right of agent to commission when he sells property by option to A and then again sells the property for A, *Finnerty v. Fritz*, 5 Colo. 174. But a broker employed to procure a customer with whom the principal would enter into an option contract on terms agreed on between the principals, need not consummate the deal, and if he is the procuring cause of the negotiations, he has earned his commissions, *Leadville M. Co. v. Hemphill*, (Ariz.) 149 P. 384.

Right of optionee to recover from his agent share of profits on sale of option, *Krhut v. Phares*, 80 Kan. 515, 103 P. 117.

Broker who gives option to prospective purchaser, can not claim to have found a purchaser until the purchaser elects and the purchase is completed, *Block v. Ryan*, 4 App. D. C. 283; *Martin v. Wilson*, *supra*, and the election must be within the time limit, *Brown v. Mason*, 155 Cal. 155, 99 P. 867, 12 L. R. A. (N. S.) 328; see *Martin v. Wilson*, 24 Idaho 353, 134 P. 532; *Barber v. Hilderbrand*, 42 Neb. 400; 60 N. W. 594; *Horton v. Immen*, 145 Mich. 438, 108 N. W. 746.

<sup>7</sup> *Henry v. Black*, 213 Pa. 620, 63 Atl. 250.

he takes an option in his own name, he is not entitled to specific performance when a conveyance has been made to the principal.<sup>8</sup>

Plaintiff employed the defendant to procure an option for him on certain property at the price of \$1,850 and defendant secured an option on the property from the owner to himself for \$1,520. Plaintiff paid defendant \$1,850, out of which the defendant paid the owner \$1,520, took a deed in his own name and then conveyed the property to plaintiff. It was held defendant was the agent of plaintiff; that the conduct of defendant was fraudulent and that plaintiff was entitled to recover from defendant the excess of price paid by him to defendant.<sup>9</sup>

**SEC. 206. PARTIES. TENANTS IN COMMON. JOINT TENANTS.**—It is familiar law that co-tenants do not sustain the relation of principal and agent and also that they are not partners, and the general rule is that one co-tenant has no

<sup>8</sup> *Pace v. Cline*, (Colo.) 147 P. 672.

<sup>9</sup> *Callaway v. Wilson*, 141 Cal. 421, 74 P. 1035.

Promoter of plan for establishing manufacturing plant held on facts not to be the agent of the owner of the land, *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413.

A co-agent with power to sell is not bound by an unauthorized option not given or ratified by him, and if he purchases for himself he can not be held as trustee for the claimant under such option, *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 A. S. R. 977, 2 Ann. Cas. 421.

An agreement of the optionee in possession under oral extension to divide commissions with optionor on sale, is within California Statute of Frauds, *Crowell v. Ewing*, 4 Cal. App. 358, 88 P. 285.

As to ratification by principal of acts of agent where part performance of oral contract is involved, see *West v. Wash. etc. R. R.*, 49 Ore. 436, 90 P. 666.

power or authority to bind the estate of the other. And this rule applies to both real and personal property.<sup>1</sup>

The estate of the co-tenant is several; he holds by a separate and distinct title; the only unity is that of possession. It follows that one tenant in common can not, in the absence of previous authority, subsequent ratification, or estoppel, grant an option on the common property that will be binding upon the other tenants.<sup>2</sup> However, one tenant in common may grant an option upon his undivided interest,<sup>3</sup> and of course all of the tenants may join in granting an option which will be effective to bind their respective interests or estates in the common property.<sup>4</sup>

Where a co-tenant of land, without authority, attempted to bind his co-tenants to an option contract to sell the land and assumed authority to sign the name of his co-tenant thereto, the latter was not required to repudiate the contract or take any action in the premises to notify the purchaser, of his co-tenant's lack of authority, on pain of being presumed to have ratified the same, but was entitled to ignore the transaction. Nor was he estopped to deny such want of authority in the absence of

<sup>1</sup> Tuttle v. Campbell, 74 Mich. 652, 42 N. W. 384, 16 A. S. R. 652; Jackson v. Moore, 87 N. Y. S. 1101, 94 App. Div. 504.

<sup>2</sup> See James v. Darby, 100 Fed. 224, 40 C. C. A. 341, also holding that an acceptance by one of two owners in common of land, of an offer to purchase the entire part, without the sanction of the other co-owner does not create a contract binding on either of the parties; see Womack v. Douglas, 157 Ky. 716, 163 S. W. 1130, broker's commission.

<sup>3</sup> Woods v. Early, 95 Va. 307, 28 S. E. 374; Schee v. McQuilken, 59 Ind. 269.

<sup>4</sup> James v. Darby, *supra*.

evidence that he accepted benefits under the contract so made by his co-tenant.<sup>5</sup>

So far as the power of joint tenants to grant an option privilege is concerned, the above rules touching tenants in common govern.<sup>6</sup>

**SEC. 207. PARTIES. HOMESTEAD AND DOWER RIGHT OF WIFE.**—The husband as such has no authority or power to grant an option covering the dower right of his wife in his lands.<sup>1</sup> Nor, under statutes common to many states, does the granting of an option by a husband for the purchase of the homestead affect the interest or estate of his wife therein, and in many jurisdictions, in the latter case, the contract is void.<sup>2</sup>

<sup>5</sup> *Naylor v. Parker*, (Tex. Civ. App.) 139 S. W. 93.

As to authority of managing partner, see *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887; see also Sec. 806a.

<sup>6</sup> See *People v. Marshall*, 8 Cal. 51; *Browning v. Cover*, 108 Pa. 595; *Trustees v. Lodge*, 100 Wis. 223, 75 N. E. 954, 69 A. S. R. 912.

<sup>1</sup> *Graybill v. Braugh*, 89 Va. 895, 17 S. E. 558, 37 A. S. R. 894, 21 L. R. A. 153; *Krah v. Radcliffe*, 78 N. J. Eq. 305, 81 Atl. 1133; *Sloan v. Williams*, 138 Ill. 43, 27 N. E. 531, 2 L. R. A. 496; *Jones v. Barnes*, 94 N. Y. S. 695, 105 App. Div. 287; *Aiple v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652.

<sup>2</sup> *Miller v. Gray*, 29 Tex. Civ. App. 183, 68 S. W. 517; *Moses v. McClain*, 82 Ala. 370, 2 So. 741, holding on facts, deed of husband alone void; see *Faraday Coal Co. v. Owens*, 26 Ky. L. Rep. 243, 80 S. W. 1171.

Though wife with husband signed deed conveying homestead and deposited same in escrow, the grantee is not entitled to specific performance of the contract where the notary who took the wife's affidavit was disqualified, *Watkins v. Youll*, 70 Neb. 81, 96 N. W. 1042.

If the homestead is declared after the execution of an option by the husband, the wife having notice thereof, the homestead right is subject to the rights of the optionee to enforce the same, *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522.

However, where the wife executes the option with her husband, as well as where she signs an option made by the husband alone, her estate will be bound.<sup>3</sup> But if she has not obligated herself, she commits no fraud by refusing to release her dower right, since such right is her own property and not that of her husband.<sup>4</sup>

Where the wife joins the husband in a conveyance to a purchaser with notice of plaintiff's prior option, the effect of the conveyance is to release the dower right in favor of the prior optionee.<sup>5</sup>

The wife of the optionee acquires no dower right in the optioned property prior to election to purchase. Therefore, an assignment of the option by the optionee can be made by him prior to his election, without joining his wife in the assignment.<sup>6</sup>

Under the Kentucky statute, the wife has no dower interest in land to which, before marriage, the husband had given an option to purchase, where the option was exercised within the time limit.<sup>7</sup>

<sup>3</sup> *Agar v. Streeter*, 183 Mich. 600, 150 N. W. 160.

The fact that the optionee is a femme covert does not render the option void, when she elects and offers to perform, *Yerkes v. Richards*, 153 Pa. 646, 26 Atl. 221, 34 A. S. R. 721.

<sup>4</sup> *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25.

<sup>5</sup> *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544.

<sup>6</sup> *Fletcher v. Painter*, 81 Kan. 195, 105 P. 500.

<sup>7</sup> *Mineral Dev. Co. v. Hall*, (Ky. L.) 115 S. W. 230.

Upon death of husband, the dower right passes to the wife who did not execute the option with her husband, *Rockland etc. Co. v. Leary*, 203 N. Y. 469, 97 N. E. 431.



SEC. 208. FORMAL REQUISITES.—An option contract is not a deed nor is it a specialty within the meaning of the common law rule requiring such contracts to be under seal, and our conclusion, therefore, is that an option contract is valid at common law without a seal. Option contracts, however, are frequently under seal. The effect of a seal in some jurisdictions is to import a consideration to support the option contract, or speaking more technically, to dispense with a consideration, or to make the recital of consideration conclusive against the parties. This subject will be further discussed in the chapter devoted to consideration.<sup>1</sup>

Whether a particular option contract is required to be in writing depends upon its subject matter and terms. This subject will be found treated in the chapter on Statute of Frauds.<sup>2</sup> It may, however, be here said that an oral option contract is valid unless it falls within the provisions of that statute.

<sup>7</sup> Under Montana statute, a contract giving an option to purchase is not a conveyance which will bar dower when the option is not exercised until after the death of the husband, *Tyler v. Tyler*, 50 Mont. 65, 144 P. 1090; also holding that where husband and wife gave an option to purchase land and deposit their deed in escrow and the husband dies before delivery, the widow is entitled to dower in the land.

Defense that wife's signature to the option was procured by fraud, held not sustained, *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228.

<sup>1</sup> Chapter III.

<sup>2</sup> Chapter IV.

But if the offer contemplates that the option contract shall be in writing, it does not constitute a binding contract until reduced to writing and executed, *Couch v. McCoy*, 138 Fed. 696.

No particular form of words is necessary to make an option contract. The courts look to the intention of the parties, and if the intention can be gathered from the language used, the agreement will be upheld. These agreements are often made by correspondence or by "wire" and may, therefore, consist of several different writings. But the rule is the same in all cases. If the contract shows the parties, subject matter, price, terms and conditions, and is legal, and meets the requirements of the Statute of Frauds, it will be upheld.

An option contract required to be in writing must be signed by the optionor but it is not necessary that it be signed by the optionee to entitle the latter to enforce it upon due and timely election.<sup>3</sup> The option contract, when in writing, must, also, of course, be delivered.<sup>4</sup>

SEC. 209. TERMS AND PROVISIONS MUST BE DEFINITE AND CERTAIN.—An option contract must be complete and certain in its terms, that is to say, the parties and its subject matter must be identified by it, and the terms and provisions of the contract must be stated in writing, if required to be in writing, or established by competent evidence, if not required to be in writing, with that certainty and definiteness which will enable a court to determine that the parties, by an election

<sup>3</sup> See Sec. 407.

<sup>4</sup> Where an option contract is left with a third person as custodian, without any condition as to delivery, it is not an escrow, *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249, 251.

thereunder, have concluded an agreement and also what the exact terms of that agreement are.<sup>1</sup>

A contract giving an option on coal in place, containing a provision that the option is good for one month at eight cents royalty per ton, is not specifically enforceable, even though there is an election, where there is no provision as to when the royalties should be paid, or fixing the term of the contract, or the maximum or minimum quantities to be mined.<sup>2</sup>

SEC. 210. TERMS AND PROVISIONS MUST BE DEFINITE AND CERTAIN. PRICE.—There is conflict in the cases whether a contract falling within the provisions of the Statute of Frauds must express the consideration in the writing.<sup>1</sup> The Statute of Frauds, however, goes merely to the proof of the contract. The rule to be considered here goes to the sufficiency only of the contract

<sup>1</sup> *Couch v. McCoy*, 138 Fed. 696; *Buckmaster v. Thompson*, 36 N. Y. 558; *Grizzle v. Gaddis*, 75 Ga. 350.

An option contract being an offer of a contract to be raised by an "acceptance," it follows that an option, if it is not complete and definite in all its terms, can not be raised to a valid contract by mere "acceptance," see *Monahan v. Allen*, 47 Mont. 75, 130 P. 768; *Prior v. Hilton & D. L. Co.*, 141 Ga. 117, 80 S. E. 559.

When an option to extend a lease is "at the mutual agreement of the parties to the lease," it is void, *Pause v. City of Atlanta*, 98 Ga. 92, 26 S. E. 489, 58 A. S. R. 290.

Option held not indefinite as to whether it was an option or a lease, *Hilberg v. Greer*, 172 Mich. 505, 138 N. W. 201.

Specific performance not decreed when contract to renew lease does not specify the term, *McKnight v. Broadway Inv. Co.*, 147 Ky. 535, 145 S. W. 377.

Option in lease held not uncertain for failure to state when rent was due, etc., *Bushman v. Faltis*, (Mich.) 150 N. W. 848.

<sup>2</sup> *Zimmerman v. Rhodes*, 226 Pa. 174, 75 Atl. 207.

<sup>1</sup> See Sec. 406.

from the standpoint of certainty and completeness. Excepting the cases where, in the absence of a price fixed by the parties, the law implies a reasonable price for the property sold and delivered,<sup>2</sup> an executory contract, the terms of which, do not fix a definite price, or fix a method or means of determining the price with certainty, is incomplete and therefore is not enforceable.<sup>3</sup>

When, for instance, a clause in a lease gives the lessee the option to renew but discloses no certain basis for the ascertainment of the rental to be paid, it is void.<sup>4</sup> Where the agreement provides that the purchase money shall be paid "cash on delivery of deed, or one-half on time, if terms can be agreed upon at time of sale," it is void for uncertainty.<sup>5</sup>

An option contract for the purchase of land which is certain as to the minimum amount of cash to be paid, and giving the optionee the right to pay

<sup>2</sup> The implication to pay a reasonable price arises when the contract has been executed and may arise when the contract is executory, but these cases are to be distinguished from those where the contract was never completed because of failure to agree upon the price, see *Tiffany on Sales*, p. 33-34.

<sup>3</sup> *Elmore-Quillian & Co. v. Parish Bros.*, 170 Ala. 499, 54 So. 203.

<sup>4</sup> *Morrison v. Rossignol*, 5 Cal. 65; see, also, *Smoyer v. Roth*, (Pa.) 13 Atl. 191, option price left open; *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741, option, or first refusal, no price named; *Baker v. Shaw*, 69 Wash. 99, 122 P. 611, involving inventory and deduction for liabilities.

First refusal to renew lease implies same terms, *Callahan Co. v. Michael*, 45 Ind. App. 215, 90 N. E. 642.

<sup>5</sup> *Wallace v. Figone*, 170 Mo. App. 362, 81 S. W. 492; *Potts v. Whitehead*, 21 N. J. Eq. 55, affirmed 23 N. J. Eq. 512, time of payment of mortgage note.

*Rider v. Gray*, 10 Md. 282, 69 Am. Dec. 135, agreement to be reduced to writing, holding when subsequent negotiations necessary, contract is void; also *Monahan v. Allen*, 47 Mont. 75, 130 P. 768.

all cash, becomes definite and certain upon the optionee's accepting the option and paying all cash, and, consequently, the other condition of the contract as to securing the balance in case part cash only is paid, is rendered immaterial.<sup>6</sup>

When the price of the land is fixed by the option contract as not to exceed \$75 per acre, it is not void for uncertainty of price, as the optionee can make a valid contract of sale by accepting the offer at that price.<sup>7</sup>

SEC. 211. TERMS AND PROVISIONS MUST BE DEFINITE AND CERTAIN. PRICE FIXED BY OFFER OF THIRD PARTIES, ETC.—An option recited that "in consideration of \$1000 advanced to me by H, I hereby agree, if I should decide to sell my half interest in (certain lands), to give him the option of purchasing the same for his clients at any price that may be offered by other parties." The optionor, without notice to the optionee, sold the property to a third person for a certain sum. The optionee thereupon brought suit to recover damages, alleging that the value of the option was the excess of the selling over the option price. It was urged as a defense that the price to

<sup>6</sup> *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637; see *Christian etc. Co. v. Beinville etc. Co.*, 106 Ala. 124, 17 So. 352, contract to supply water for "three years or longer."

*Powell v. Lovegrove*, 8 DeG. M. & G. 357, 2 Jur. (N. S.) 791, 44 Eng. Reprint 427, option for lease and rental fixed on percentage of purchase price, outlay for repairs, etc.; *Fogg v. Price*, *supra*.

<sup>7</sup> *Wright v. Kaynor*, 150 Mich. 7, 113 N. W. 779; *Heyward v. Willmarth*, 84 N. Y. S. 75, 87 App. Div. 125.

So where there is a specified price per acre, *Murphy v. Anderson*, 128 Minn. 106, 150 N. W. 387.

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be paid under the option was not stated and that the contract was, therefore, void, but the Court ruled the contract must be construed as meaning that if any price was offered to the optionor for the property which she would be willing to accept, it was her duty to give the optionee the privilege of purchasing at that price.<sup>1</sup>

The same conclusion was reached in a Nebraska case where a provision in a lease of land gave the lessee an option to purchase the property during the term "at any price offered by a third party satisfactory to" the lessor;<sup>2</sup> and in a Texas case where an option in a lease gave the lessee "the preference right to purchase said land at any *bona fide* offer made and acceptable (to the lessor) by any responsible party;"<sup>3</sup> and in an Illinois case where a provision in a lease reserved the right to the lessor to sell the land at any time but provided that no sale should be made by him "without first having given said second party (lessee) the privilege of purchasing said land upon such terms and at the same price per acre, as any other person or purchaser might have offered therefor;"<sup>4</sup> and in another case, from the same state, where, by the provisions of a lease

<sup>1</sup> Pearson v. Horne, 139 Ga. 453, 77 S. E. 387.

<sup>2</sup> Harper v. Runner, 85 Neb. 343, 123 N. W. 313.

<sup>3</sup> Slaughter v. Mallet L. & C. Co., 141 Fed. 282, 72 C. C. A. 430; also Jones v. Monerief-Cook Co., 25 Okl. 856, 108 P. 403; Arnot v. Alexander, 44 Mo. 25, 100 Am. Dec. 252.

<sup>4</sup> Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555, distinguishing cases involving arbitration and valuation clauses, and citing Homfray v. Fothergill, L. R., 1 Eq. 576, involving an agreement between partners and providing that no partner should sell his shares without first offering them to the other partners collectively, after notice, and should not sell to a stranger for less than £500 per share more than the price offered to the other partners.

the lessee was given "the first opportunity to purchase said premises provided he will pay as much as any other person."<sup>5</sup>

In a Utah case,<sup>6</sup> the contract provided that in consideration of the sale of shares of stock, the sellers gave the buyer "an option on all their or either of their interests in the estate of JM, deceased, or refusal to purchase the same at a price as low as any other *bona fide* offer for it or any portion of it." The Court held the option was not uncertain as to the price.

Where, by the provisions of an option, the price is fixed by an offer of a third person, the offer must

<sup>5</sup> Marske v. Willard, 169 Ill. 276, 48 N. E. 290.

<sup>6</sup> Cummings v. Nielson, 42 Utah 157, 129 P. 619, the court saying that by the terms "refusal to purchase" everybody knows what is meant, although the conditions may not be fully expressed; what is meant thereby is that if the owner of the interest in question desires to sell it he must communicate that fact to the party holding the option to purchase and thus give the latter an opportunity to purchase or refuse to do so; see, also, McCormick v. Stephany, 61 N. J. Eq. 208, 48 Atl. 25.

As to the meaning of "right of pre-emption," see Garcia v. Callender, 125 N. Y. 307, 26 N. E. 283; DeRutte v. Muldrow, 16 Cal. 505; Jackson v. Groat, 7 Cow. (N. Y.) 285.

As to "first privilege," see Meyer v. Jenkins, 80 Ark. 208, 96 S. W. 991.

First refusal to renew lease, see Callahan Co. v. Michael, 45 Ind. App. 215, 90 N. E. 642.

First privilege to buy at "fair market price," Myers v. Metzger, 61 N. J. Eq. 522, 48 Atl. 1113.

A "first option" to purchase any premises that might be designated for dairy purposes on the property, is void for uncertainty, Ryan v. Thomas, (Eng.) 55 S. Jr. 364, on the theory that "first option" is without definite meaning.

Right of optionee to discover name of third party making offer, see Taylor etc. Coke Co. v. Hartman, 222 Pa. 172, 70 Atl. 1001.

be *bona fide* and the price one that a buyer would pay.<sup>7</sup>

SEC. 212. TERMS AND PROVISIONS MUST BE DEFINITE AND CERTAIN. "REFUSALS." PREFERENCE RIGHT TO PURCHASE, ETC.—The cases presented in the preceding section must be distinguished from those where the agreement gives the optionee the first chance, or a preference right, "to make a contract." It will be noted in the cases there cited that in every instance the price was definitely and certainly fixed by the offer made by a third person, or by the amount for which the optionor was willing to sell. A Massachusetts case<sup>1</sup> is in point here. A covenant in a lease provided that "if the premises are for

<sup>7</sup> *Manchester S. C. Co. v. Manchester R. Co.*, 2 Ch. Div. 37, 70 L. J. Ch. 468, 84 L. T. Rep. (N. S.) 436, 17 T. L. R. 410, 49 Wkly. Rep. 418.

When the optionor notified the optionee of an offer of \$20,000 by a third person which the optionee paid, when the best *bona fide* offer was \$10,000, he was entitled to recover \$10,000 damages, without regard to the value of the lease by which the option was given, *Guffey v. Clever*, 146 Pa. 548, 23 Atl. 161.

<sup>1</sup> *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741, citing *Bromley v. Jeffereys*, 2 Vern. 415, Prec. Ch. 138, 24 Eng. Reprint 66, involving a marriage settlement providing that upon marriage of plaintiff to daughter of settlor and issue of marriage, plaintiff should have certain lands at a certain sum less than any other purchaser would give for the same. The Court refused specific performance "because, if the estate was not to be sold, but plaintiff was to have it, it would not be practicable to know what a purchaser would give for it."

The Court in *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555, commenting on these decisions said the clear intimation in both cases is that, if there had been a mode provided for the ascertainment of the price, the holdings would have been otherwise, and further that according to the doctrine of some of the later cases, the difficulty found by the Court in the *Bromley* case would have been overcome, evidently meaning that the Court itself would have found some way of fixing the price.



sale at any time, the lessee shall have the refusal of them." This, the court said, "is simply an agreement to give the lessee the first chance to make a contract—an agreement of sale—if the parties can agree, but not otherwise. It neither fixes the price nor provides any way in which it can be fixed." Though not expressly set forth it may be inferred that the bill for specific performance by the optionee alleged that the optionor had made a sale and thereby fixed the price, thus removing the difficulty, but the court answered by saying that to enforce the contract under such circumstances, it would have to add a clause which was not in the contract, as the contract "does not contemplate a sale to somebody else as a mode of ascertaining the price at which the lessor will sell to the lessee. . . . The Statute of Frauds remains unsatisfied, notwithstanding what has happened." This difficulty, however, might be removed in those jurisdictions where, by force of statute or judicial interpretation, it is not necessary to set forth the sale price in order to meet the requirements of the Statute of Frauds.

An Iowa case<sup>2</sup> is much like the Massachusetts case above cited. In the former the lease provided that whenever the lessor "shall offer the above described land for sale" he would give the lessee the opportunity to buy the same. The Court construed this to mean nothing more than "an offer for sale,"

<sup>2</sup> Wolf v. Lodge, 159 Iowa 162, 140 N. W. 429; see, also, Folsom v. Harr, 218 Ill. 369, 75 N. E. 987, 109 A. S. R. 297, where the clause in the lease was that if the lessor concluded to sell, then the lessee was "to have the first chance to buy the same," the Court holding no price was fixed, but saying if the clause had been at any price offered by a third person, it would have been sufficient under the decision in Hayes v. O'Brien, *supra*.

that is, to put the land on the market and not as implying an offer to sell at a fixed price.

**SEC. 213. TERMS AND PROVISIONS MUST BE DEFINITE AND CERTAIN. ARBITRATION, VALUATION AND APPRAISAL CLAUSES.**—So far as the subject matter of this chapter is concerned, it is necessary only to bring out that an executory agreement in an option to purchase property, the price of which is to be fixed by arbitration or appraisers, is fatally defective as a contract and, therefore, is not enforceable, where there is a failure or refusal of such persons to fix the price.<sup>1</sup>

It is otherwise, of course, where the contract provides that the price shall be the reasonable or the fair valuation of the property. In such cases the implication is that the valuation shall be made by the parties and if they are unable to agree, then the Court will make the valuation itself and fix the price.<sup>2</sup>

**SEC. 214. DESCRIPTION.**—The rule here, to meet the requirement of the Statute of Frauds, as well as to make a complete contract, is that with reference to real property, it must be described in

<sup>1</sup> *Elberton Hdw. Co. v. Hawes*, 122 Ga. 158, 50 S. E. 964; *Louise Werner Sawmill Co. v. O'Shee*, 111 La. 817, 35 So. 919.

After party has appointed arbitrator or appraiser he can not withdraw the appointment, *Guild v. Atchison etc. R. Co.*, 57 Kan. 70, 45 P. 82, 57 A. S. R. 312, 33 L. R. A. 77. See, however, *Piggot v. Mason*, 1 Paige (N. Y.) 412.

<sup>2</sup> *Estes v. Furlong*, 59 Ill. 298; see, generally, *Faucett v. Northern Clay Co.*, (Wash.) 146 P. 857.

*Kaufmann v. Liggett*, 209 Pa. 87, 58 Atl. 129, 67 L. R. A. 353, 103 A. S. R. 988, when arbitrators failed to agree and Court fixed the amount of rent for the extended term. See, also, Sec. 1213.

the writing so that it can be identified from the writing itself. Parol evidence is not admissible to supply the description, but such evidence is admissible and admissible only to show the application of the description, as given, to the particular property intended to be conveyed by and described in the agreement, the purpose of such evidence, in a sense, being to exclude all other property from the operation of the agreement. In other words, parol evidence is admissible to identify the property described in the agreement, but is not admissible for the purpose of furnishing or supplying a description. If the description given does not meet the requirements of these rules, the contract is void.<sup>1</sup>

<sup>1</sup> Barnes v. Hustead, 219 Pa. 287, 68 Atl. 839; see Heyward v. Bradley, 179 Fed. 325, 102 C. C. A. 509, right of way; Wadick v. Mace, 191 N. Y. 1, 83 N. E. 571, reversing s. c. 103 N. Y. S. 998; Bauer v. Lumaghi C. Co., 209 Ill. 316, 70 N. E. 634, right of way; Eaton v. Wilkins, 163 Cal. 742, 127 P. 71, the fact the vendor furnished abstract of title is immaterial; Broadway H. & S. v. Decker, 47 Wash. 586, 92 P. 445, "house No. 322 Broadway"; Tippins v. Phillips, 123 Ga. 415, 51 S. E. 410, description not supplied by subsequent letter; Statute of Frauds, see Sec. 406.

Description held sufficient: Wilkins v. Hardaway, 159 Ala. 565, 48 So. 678, dam site to be selected; Waters v. Bew, *infra*, right of way; South Florida etc. Co. v. Walden, 59 Fla. 606, 51 So. 554; Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; Guyer v. Warren, 175 Ill. 328, 51 N. E. 580; Brooks v. Wentz, 61 N. J. Eq. 474, 49 Atl. 147, reasonable certainty only is required; Worch v. Woodruff, 61 N. Y. Eq. 78, 47 Atl. 725; House v. Jackson, 24 Ore. 89, 32 P. 1027; Smith's Appeal, 69 Pa. St. 474, parol evidence; Marske v. Willard, 169 Ill. 276, 48 S. E. 290, parol evidence to supply number of lot blank for which was left unfilled; Barrett v. McAllister, 33 W. Va. 738, 11 S. E. 220; Pearson v. Horne, 139 Ga. 453, 77 S. E. 387; Thompson v. Pennebaker, 173 Fed. 849, 97 C. C. A. 591, water right; Easton v. Thatcher, 7 Utah 99, 25 P. 728; Joyee v. Tomasini, 168 Cal. 234, 142 P. 67, no state or county; "Our electric depot and power plant" sufficient, Western Sec. Co. v. Atlee, (Iowa) 151 N. W. 56; reservation of five acres to be located by optionor, Rouse v. Riverton Coal & Dev. Co., 71 Ore. 154, 142 P. 343.

The above general rules apply to contracts for the sale of personal property required by law to be in writing. Where such contracts are not required to be in writing, it would seem that a description of the property intended to be sold is sufficient, provided it can be identified.<sup>2</sup>

**SEC. 215. LEGALITY AND VALIDITY.**—In a sense all option contracts are contingent because the right of election may or may not be exercised within the time or upon the conditions stipulated, but such contingency does not render an option invalid.<sup>1</sup> At first the validity of such contracts was doubted but the right of the parties to make such contracts as well as their enforceability is now well established.<sup>2</sup>

<sup>1</sup> Description held to include disputed lot, *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; see *Gaylord v. McCoy*, 158 N. C. 325, 74 S. E. 321, see s. c. 77 S. E. 959, particular controls general description.

Where both parties acted under the lease, *Fred Gorder & Son v. Pankonin*, 83 Neb. 204, 119 N. W. 449.

Limitation may not be added, *Waters v. Bew*, 52 N. J. Eq. 787, 29 Atl. 590.

<sup>2</sup> *McCandlish v. Newman*, 22 Pa. 460; *Price v. Atkinson*, 117 Mo. App. 52, 94 S. W. 816; *Ferguson v. McCowan*, 124 Ga. 669, 52 S. E. 886; *Warfield v. Curd*, 35 Ky. 318; *Bricker v. Hughes*, 4 Ind. 146.

<sup>1</sup> *Anse La Butte Oil Co. v. Babb*, 122 La. 415, 47 So. 754; *Boyer v. Nesbitt*, 227 Pa. 398, 76 Atl. 103, option and voting pool; *Maryott v. Swaine*, 28 N. J. Eq. 589, not favored in equity; *Buck v. Walker*, 115 Minn. 239, 132 N. W. 205, option in deed reserving mineral rights; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Saxby v. Southern Land Co.*, 109 Va. 196, 63 S. E. 423.

<sup>2</sup> *Boyer v. Nesbitt*, *supra*; *W. G. Reese Co. v. House*, 162 Cal. 740, 124 P. 442; *Williams v. Tiedemann*, 6 Mo. App. 269; *George etc. Co. v. Maxwell*, 78 Ohio St. 54, 84 N. E. 595; *Cherry v. Smith*, 22 Tenn. 19, 39 Am. Dec. 150; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881; *Waterman v. Waterman*, 27 Fed. 827; *Hanna v.*

It is said the right of the owner of property, for a consideration, to sell the power to withdraw his offer of sale, or to retract his promise to keep such offer open for a limited or reasonable time, is now as well established as his right to sell the property itself.<sup>3</sup>

A direction in a will that if any residuary legatee desires to purchase any of the property, he may do so at its current market price, at the time of testator's death, as valued by the executors, and the same shall be charged against the share as money paid to the legatee, is legal and must be given effect whatever the court may think of its practical value.<sup>4</sup>

An agreement between owners of a majority of stock of a corporation that in the event of the death of any party, or his wish to sell his stock, the others shall have the privilege of purchasing at a specified price per share, is not invalid as a wager on the life of the party, or as interfering with the devolution

Ingram, 93 Ala. 482, 9 So. 621; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Dambmann v. Lorentz*, 70 Md. 380, 17 Atl. 389, 14 A. S. R. 364; *City of Indianapolis v. Gas Co.*, 144 Fed. 640, 75 C. C. A. 442, option to city to purchase plant; option to lessor, *Jackson v. Schutz*, 18 Johns. (N. Y.) 174, 9 Am. Dec. 195.

<sup>3</sup> *DeRutte v. Muldrow*, 16 Cal. 505, "A man may as well bind himself to make a contract as to bind himself by contract."

See *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Butler v. Thompson*, 92 U. S. 412, 23 L. Ed. 684; *Patterson v. Farnington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853, 858; *Elliott v. DeLaney*, 217 Mo. 14, 116 S. W. 494; *Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687; *Pittsburg etc. Co. v. Bailey*, 76 Kan. 42, 90 P. 803; *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; *Woodward v. Davidson*, 150 Fed. 840, (reversed on other grounds, 156 Fed. 915), holding an option "as sacred as any other contract"; *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541.

<sup>4</sup> *In re Walbridge*, 198 N. Y. 234, 91 N. E. 590.

of property by will upon the death of its owner. Nor, is it invalid as a restraint on the right to alienate the stock, or unlawful as a scheme to control the corporation,<sup>5</sup> or because the optionee is given the "refusal" to purchase at a price as low as any other *bona fide* offer for the stock.<sup>6</sup>

An option to a railroad to purchase timber lands, given as an inducement to locate its road, is not void *per se* as against public policy,<sup>7</sup> nor, because it was taken as a speculation.<sup>8</sup>

An option expressed upon the face of a certificate of stock giving to the corporation the right of repurchase upon certain terms, is valid, when no right of creditors is affected.<sup>9</sup>

<sup>5</sup> *Seruggs v. Cotterill*, 73 N. Y. S. 882, 67 App. Div. 583; *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648, stock; *Fitzsimmons v. Lindsay*, 205 Pa. 79, 54 Atl. 488, stock; *Boyer v. Nesbitt*, 227 Pa. 398, 76 Atl. 103; *In re Lindsay's Estate*, 210 Pa. 224, 59 Atl. 1074; *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57.

*Anse La Butte Oil etc. Co. v. Babb*, 122 La. 415, 47 So. 754, or a perpetuity, or contrary to public policy, or because no time was fixed,—oil lease.

Option on shares of stock of insurance company given by it as inducement to take out policy, discriminatory and void under New York laws, *People v. Commercial Life Ins. Co.*, 247 Ill. 92, 93 N. E. 90.

*Moses v. Scott*, 84 Ala. 608, 4 So. 742, holds that an agreement similar to the one stated in the text would not be specifically enforced.

<sup>6</sup> *Cummings v. Nielson*, 42 Utah 157, 129 P. 619, nor as to time limit, *Bendix v. Staver Carriage Co.*, 174 Ill. App. 589, "first refusal" on certain number of motor cars each month. See Sec. 212.

<sup>7</sup> *McCowen v. Pew*, 153 Cal. 735, 96 P. 893, 21 L. R. A. 800, 15 Ann. Cas. 630.

<sup>8</sup> *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881, 1 Ann. Cas. 986.

<sup>9</sup> *Douglas v. Aurora Daily News Co.*, 160 Ill. App. 506, and a person acquiring such certificate obtains no greater rights than the party had to whom it was originally issued.

A contract by the seller of corporate stock to repurchase within a specified time, at the option of the purchaser, is valid.<sup>10</sup>

A contract by a corporation with a subscriber to its stock which is issued and paid for, to repurchase the same, at the subscriber's election, is invalid as against the trustee in bankruptcy of the corporation under the penal laws of New York,<sup>11</sup> and it is held that a corporation has no power to sell its stock and agree with the purchaser to buy it back, within a given time, at the price paid, upon his election to

<sup>10</sup> *Smith v. Alexander*, 128 Ill. App. 507.

<sup>11</sup> *Tichenor-Grand Co., In re*, 203 Fed. 702.

But an agreement to redeem is not invalid under California corporation laws, *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 129 P. 582.

Power of corporation to take option on its own stock, see *Bartlett v. Fourton*, 115 La. 26, 38 So. 882; *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 74 P. 938, 101 A. S. R. 569.

A person need not own property in order to sell an option to purchase it, *Burks v. Davies*, 85 Cal. 110, 24 P. 613, 20 A. S. R. 213.

Validity of contract affecting real property should be determined by the law of the state in which it is situate, *Dal v. Fischer*, 20 S. D. 426, 107 N. W. 534.

Option taken by city on lighting plant is not, before election, repugnant to constitutional inhibition against incurring debt beyond revenue of the year, *Overall v. Madisonville*, 125 Ky. 684, 102 S. W. 278, 12 L. R. A. (N. S.) 433, 31 Ky. L. Rep. 278.

Validity of option on homestead of citizen of Creek Nation, *Barnes v. Stonebraker*, 28 Okl. 75, 113 P. 903.

United States Internal Revenue Stamp Act: In *Hughes v. Antill*, 23 Pa. S. Ct. 290, it was held that an option contract was not required to be stamped under act of June 13, 1898; see *White v. Treat*, 100 Fed. 290.

<sup>11</sup> Under the Missouri statute, agreement on sale of stock of original issue, to repurchase, is *ultra vires* as it amounts to a decrease of its capital stock, *Wilson v. Torchon etc. Co.*, 167 Mo. App. 305, 149 S. W. 1156; see, *contra*, *Fremont C. Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376.

sell, the effect of which is to release him from responsibility as a stockholder.<sup>12</sup>

SEC. 216. FUTURES.—A contract to purchase shares of stock, or other chattels, as a mere speculation, without any intention of receiving and holding them, is void as a gambling transaction under the English statute and decisions. In America it is generally held that such contracts are invalid where the understanding between both of the parties is that there is not to be a delivery of the article and that the difference only between the contract price and the market price, at a designated time, is to be paid.<sup>1</sup>

A presentation of this subject, however, does not fall within the scope of this work, further than to say that it is held quite generally by the American courts that if the agreement of the parties is that the contract shall be performed by delivery, if either party shall require it, in accordance with its terms, the contract is not a wagering contract and, therefore, is not invalid.

<sup>12</sup> *Boley v. Sonora Development Co.*, 126 Mo. App. 116, 103 S. W. 975.

<sup>1</sup> See *Pearce v. Rice*, 142 U. S. 28, 35 L. Ed. 925, 12 S. Ct. 130; *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183, 21 S. Ct. 845; *Pickering v. Cease*, 79 Ill. 328; *Schlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302; *Pearce v. Dill*, 149 Ind. 136, 48 N. E. 788; *First Nat. Bank v. Oskaloosa Packing Co.*, 66 Iowa 41, 23 N. W. 255, agreement of both parties; *Billingslea v. Smith*, 77 Md. 504, 26 Atl. 1077; *Rumsey v. Berry*, 65 Me. 570; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Mohr v. Miesen*, 47 Minn. 228, 49 N. W. 862; *Isaacs v. Silverberg*, 87 Miss. 185, 39 So. 420; *Cockrell v. Thompson*, 85 Mo. 510; *Rudolf v. Winters*, 7 Neb. 125; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308; *Garsed v. Sternberger*, 135 N. C. 501, 47 S. C. 603; *Flagg v. Gilpin*, 17 R. I. 10, 19 Atl. 1084; *Dunn v. Bell*, 85 Tenn. 581, 4 S. W. 41; *Wall v. Schneider*, 59 Wis. 352, 18 N. W. 443, 48 Am. Rep. 520; *Jennings v. Morris*, 211 Pa. 600, 61 Atl. 115.



An option on shares of stock or other personal property is not invalid as a wagering contract where it is not the intention of both parties that delivery shall not be made in accordance with the terms of the option.<sup>2</sup> That is to say, the contract is not void when the transaction is one of strict option. The word option, however, has by local usage come to have the same meaning in stock transactions as "future," but the distinction between the two transactions as above stated is well marked. It is now settled law that an option contemplating the delivery of the article at the election of the optionee is valid.<sup>3</sup>

SEC. 217. MISTAKE, FRAUD, ETC.—It is essential to the validity of any contract that its terms were assented to, by the respective parties, free from mistake, misrepresentation, fraud,

<sup>2</sup> Hooper v. Nuckles, (Ala.) 39 So. 711; Kinsey Co. v. Board of Trade, 198 U. S. 236, 49 L. Ed. 1031, 25 S. Ct. 637; Wiggin v. Federal S. & G. Co., 77 Conn. 507, 59 Atl. 607; Tomblin v. Callen, 69 Iowa 229, 28 N. W. 573; Rogers v. Marriott, 59 Neb. 759, 82 N. W. 21; Kingsbury v. Kirwan, 77 N. Y. 612; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; Union Nat'l Bank v. Carr, 155 Fed. 438, 5 McCrary 71; Van Dusen-Harrington Co. v. Jungleblut, 75 Minn. 298, 77 N. W. 970, 74 A. S. R. 463.

<sup>3</sup> See Bates v. Woods, 225 Ill. 126, 80 N. E. 84, affirming 126 Ill. App. 180; Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869, affirming s. e. 111 Ill. App. 606; Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383.

Option to purchase corporate stock at fixed price not unlawful under Illinois Civil Code, Sec. 130, Bawden v. Taylor, 254 Ill. 464, 98 N. E. 941.

Agreement to repurchase under option on stock, Loeb v. Stern, 198 Ill. 371, 64 N. E. 1043.

Option to furnish coal, Standard etc. Co. v. Springfield Coal etc. Co., 146 Ill. App. 144; George J. Birkel v. Howze, 12 Cal. App. 645, 108 P. 145.

Automobile, Bendix v. Staver Carriage Co., 174 Ill. App. 589.

duress, or undue influence, and, of course, the parties must have had mental capacity. This rule applies to option contracts. Thus, where there was a misunderstanding as to the exact acreage covered by the option, so that the minds of the parties never met, the contract is uncertain and will not be enforced.<sup>1</sup> Where, by mutual mistake, an option clause was omitted from a lease, equity will reform and then enforce the instrument, notwithstanding the Statute of Frauds.<sup>2</sup>

<sup>1</sup> *Bush v. Merriman*, 87 Mich. 260, 49 N. W. 567; *Clinchfield Coal Co. v. Powers*, 107 Va. 393, 59 S. E. 370; also *McCrea v. Hinkson*, 65 Ore. 132, 131 P. 1025, reversion; see *Braun v. Wis. R. Co.*, 92 Wis. 245, 66 N. W. 196, application of rentals on price; *Pope v. Hoopes*, 90 Fed. 451, 33 C. C. A. 595, description.

*Collier v. Robinson*, 53 Tex. Civ. App. 285, 129 S. W. 389, mistake of scrivener, in failing to draft contract as optional.

*Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265, ratification.

See *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413, option on part of land previously sold to wife.

<sup>2</sup> *Butler v. Threlkeld*, 117 Iowa 116, 90 N. W. 584, where the decisions on this point are collected.

See *Swanston v. Clark*, 153 Cal. 300, 95 P. 1117, removal of improvements, rescission.

*Meek v. Hurst*, 223 Mo. 688, 122 S. W. 1022, mistake of scrivener, reformation.

*Murphy v. Hussey*, 117 La. 390, 41 So. 692, option in lease, duty to read.

That a pure mistake of fact will sometimes defeat specific performance, see *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404.

*Thomas v. Gottlieb etc. Co.*, 102 Md. 417, 62 Atl. 633, legal effect of contract; also *Carter v. Love*, 209 Ill. 310, 69 N. E. 85; *Hazelton v. LeDuc*, (D. C.) 19 App. Cas. 379.

*Hopwood v. McClausland*, 120 Iowa 218, 94 N. W. 469, legal effect, reformed.

Option to purchase not implied in lease from circumstances in absence of fraud or mistake, *Abbott v. 76 Land Co.*, 101 Cal. 567, 36 P. 1, 53 P. 445.

An option contract secured through misrepresentation and fraud will not be enforced, nor will it be permitted to form the basis of a suit for damages for breach.<sup>3</sup> But whether a particular statement is a misrepresentation, or a particular act fraudulent, must be determined in accordance with the rules on the subject applicable to contracts generally. Thus, a contract giving an option to purchase mining property, can not be rescinded for fraud because of erroneous statements made by the seller as to the quantity of ore on the property, or with reference to the title, when the purchasers were to take possession and operate the property for several months before the option expired, the statements being made in good faith and expressing the honest opinion of the sellers, who had little knowledge of practical mining.<sup>4</sup>

That an option is taken as a speculation does not render it fraudulent.<sup>5</sup> A representation to a purchaser by a person having an option on the land that he owned it, is immaterial and hence not actionable

<sup>3</sup> *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246; *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413, mere mental weakness not sufficient to avoid.

Vendor will not be relieved from a contract of sale merely because he thought it was an option, *Abel v. Gill*, 95 Neb. 279, 145 N. W. 637; *Lenman v. Jones*, 222 U. S. 51, 56 L. Ed. 89, 32 S. Ct. 18.

Otherwise where through fraud of optionee deed of conveyance is executed instead of an option, *Gillis v. Arringdale*, 135 N. C. 295, 47 S. E. 429.

<sup>4</sup> *Winter v. Bostwick*, 172 Fed. 285.

*Frank v. Schnuettgen*, 187 Fed. 515, 109 C. C. A. 281, statements by optionor of contents of option are binding on him when optionee can not read, etc., language of option.

<sup>5</sup> *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881; *Saxby v. So. L. Co.*, 109 Va. 196, 63 S. E. 423.

fraud.<sup>6</sup> Statement by an optionor that a prior option had expired when both vendor and vendee knew the true facts, is the expression of an opinion and not a fraudulent misrepresentation.<sup>7</sup> That a tenant, in obtaining a lease, simply acted for another is not fraudulent,<sup>8</sup> and, therefore, does not prevent him from suing for breach of contract to convey, on exercise of the option.<sup>8</sup>

SEC. 218. TIME LIMIT. PERPETUITIES.—The rule against perpetuities forbids the creation of future interests in property, real or personal, if the vesting of the property is made dependent upon a contingency which will not be determined within the period fixed by law for the creation of future estates. This is a brief statement of the common law rule, and it would seem it is directed solely against the vesting of property at a remote period of time.

In several of the states, following those of New York, statutes have been enacted providing, in substance, that the absolute power of alienation may

<sup>6</sup> Saxby v. So. L. Co., 109 Va. 196, 63 S. E. 423.

But where plaintiff obtains an option to purchase property for \$2,000 and represented to defendant to induce him to purchase, that the property cost \$2,500 and that defendant would have to pay only the amount demanded by the owner and the parties dealt with the property as belonging to the owner, plaintiff could not recover in excess of \$2,000, McGough v. Hopkins, 172 Mich. 580, 138 N. W. 210. Liability of promoters of corporation in case where stock is issued to them for optioned property, Hayward v. Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725.

<sup>7</sup> Rheinganz v. Smith, 161 Cal. 362, 119 P. 494; Chesbrough v. Vizard Inv. Co., 156 Ky. 149, 160 S. W. 725, prior contract not binding.

As to "trade talk," see Saxby v. So. L. Co., *supra*.

<sup>8</sup> Walshe v. Endom, 129 La. 148, 55 So. 744.

not be suspended by any limitation or condition whatever for a longer period than during the lives, or a certain number of lives, in being at the time of the creation of the limitation or condition, except in one or two enumerated cases not material here.<sup>1</sup>

The test under the common law rule, as it would seem, is whether the future contingent interest is too remote, and under the statutes whether the power of alienation is suspended, keeping in mind that the absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed, that is, a fee neither defeasible nor conditional.<sup>2</sup>

**SEC. 219. PERPETUITIES. COMMON LAW RULE. THE GOMM DECISION.**—The leading English decision is *London, etc. R. Co. v. Gomm*.<sup>1</sup>

<sup>1</sup> N. Y. Laws, 1896, Chap. 547, Sec. 32; Chap. 417, Sec. 12; Cal. Civil Code, Secs. 715-726; Mich. Comp. Laws, Sec. 8806; Minn. Rev. Laws, Sec. 3213; Wis. Anno. St., Sec. 2047; N. D. Rev. Codes, 1895, Secs. 3275-3464; S. D. Anno. St., 1901, Secs. 3587-3786; Idaho Civ. Code, Secs. 2364, 2367-91; Iowa Code, 1897, Sec. 2901; Burn's Anno. St. of Ind., 1901; Secs. 3382-3, 8133-4; Ky. St., 1903, Sec. 2360.

<sup>2</sup> See Sec. 221.

The Kentucky Court holds the test is the same both at common law and under the Kentucky statute, to-wit: whether the power of alienation may be extended beyond the permitted period, *Tyler v. Fidelity & C. Tr. Co.*, 158 Ky. 280, 164 S. W. 939.

<sup>1</sup> *London etc. R. Co. v. Gomm*, 20 Ch. Div. 562, 51 L. J. Ch. 530, 46 L. T. Rep. (N. S.) 449, 30 Wkly. Rep. 620 (1880).

The Gomm decision overruled *Birmingham Canal Co. v. Cartwright*, L. R., 11 Ch. Div. 421, (1879) which involved an option to purchase certain mines if the owner should, at any time, desire to sell them. In the latter case, Fry, J., said: "The next question arises upon the terms of the covenant giving the right of pre-emption (option),—whether that right is obnoxious to the rule against perpetuities. In my opinion the covenant is not in any way liable to that objec-

7—Option Contracts.

By deed dated August 1865, plaintiff conveyed certain land (no longer required for railroad uses) to G P in fee for £1000, and G P covenanted with the company that he, his heirs and assigns, would, at any time thereafter, whenever the land might be required for the railway or works of the company and whenever requested by the company, on six months' notice, and upon receiving £1000, reconvey the land to the company. In 1879 the defendant purchased the land from G P with notice of the

tion. I think that whenever the right or interest is presently vested in A and his heirs, although it may not arise until the happening of some contingency which may not take effect within the period defined by the rule against perpetuities, such right or interest is not obnoxious to that rule and for this reason: the rule is aimed at preventing the suspension of the power of dealing with property, the alienation of the land or other property. But when there is a present right of that sort, although its exercise may depend upon a future contingency, and the right is vested in an ascertained person or persons, that person or persons, concurring with the person who is subject to the right, can make a perfectly good title to the property. The total interest in the land, so to speak, is divided between the covenantor and the covenantee and they can together, at any time, alienate the land absolutely."

- 1 The Gomm decision was followed in the later case of *Woodall v. Clifton*, 2 Ch. 257 (1905), where Warrington, J., said the Gomm decision "is in some ways a puzzling case." He then defined a perpetuity thus: "A perpetuity is a future limitation restraining the owner of the estate from alienating the fee simple of the property discharged of such future use or estate before the event is determined." The Woodall case involved a lease for ninety-nine years, with option to purchase, at any time during the term. The option ran to the optionee, his heirs, and assigns.

In *MacKenzie v. Childers*, L. R., 43 Ch. Div. 265, 279, (1889) it is said the doctrine of the Gomm decision is "entirely novel."

The Gomm decision was also followed in *Worthington Corporation v. Heather*, 2 Ch. Div. 532, (1906) which involved a lease for thirty years with option to lessee, his heirs, etc., to purchase. The fact that the option was given for charitable purposes was held immaterial on the theory that the limitation and not the contract was void. Optionee-lessee elected to recover damages for breach of covenant to convey.

above covenant. In 1880 the company gave defendant notice to reconvey the land and upon his refusal to do so, brought suit for specific performance of the covenant. The trial court held the sale to G P was not conditional but absolute with a personal covenant on the part of G P, his heirs and assigns, to resell and that the covenant did not create any estate or interest in the land and, therefore, was not obnoxious to the rule against perpetuities.

On appeal it was held the covenant in the deed to reconvey reserved to the company an executory interest in the land to arise on an event which *might* occur after the period allowed by the rules as to remoteness, and was, therefore, void on that ground.

## SEC. 220. PERPETUITIES, CONTINUED. THE STARCHER BROTHERS DECISIONS.—

The Gomm decision was followed by the Supreme Court of Appeals of West Virginia in the two Starcher Brothers cases.<sup>1</sup> The facts in the two cases are the same. The option contract acknowledged a consideration of \$10 paid down and was conditioned on the optionees' election to take and accept the land on or before April 5, 1903, and, in that event, that they would pay therefor at the rate of \$6 per acre. The contract also provided that the

<sup>1</sup> Starcher Bros. v. Duty, 61 W. Va. 373, 56 S. E. 524, 123 A. S. R. 990, 9 L. R. A. (N. S.) 913.

Starcher Bros. v. Duty, 61 W. Va. 371, 56 S. E. 527. The Court distinguishes an option contract from a covenant in a lease for perpetual renewal, saying that the latter is one which runs with the land and is without restraint upon the right of alienation by the lessor of the property subject to the lease. As to the last point, see Sec. 223.

optionees might, prior to the 5th day of April, 1903, pay to the optionors, or deposit in a certain bank to their credit, the sum of \$10 "which shall constitute and be in full consideration for an extension of this option and agreement for the period of one year from said last mentioned date, and upon payment therefor this contract and option shall be so extended." Following this was another provision giving the optionees the right to extend the option agreement from year to year upon the payment of the sum of \$10 annually, and providing that the stipulation should extend to the heirs, assigns, executors and administrators of the parties.

The optionees deposited the \$10 annually for the years ending April 5, 1905, and prior to this date gave notice of their election to purchase the land. It was argued the clause providing for the annual extension of the option right offended the rule against perpetuities and the Supreme Court of Appeals so held, quoting the Gomm decision "that whenever a contract raises an equitable right in property which the obligee can enforce in a court of chancery, by a decree of specific performance, such equitable right is subject to the rule against perpetuities."

The Court further remarked the mere fact that a contingent interest may be released by persons in being and that a good title may thus be made, is not enough to take the case out of the rule; that the rule was aimed not only against restraints upon the alienation of present interests but was also directed against the creation of future interests in property; that the option contract, not containing some term of limitation requiring the optionee to exercise the



right to take the property within a reasonable time, not too remote, was void and void from its inception; that the option contract provided the option might be extended annually to an indefinite period, and, therefore, to a time beyond which the rule against perpetuities will allow.<sup>2</sup>

In a subsequent case,<sup>3</sup> a deed of land reserved to the grantor "at any time thereafter" or within 99 years from the date of the deed, that he should pay or tender to the grantee a certain sum per acre for the land conveyed, the right to a conveyance of certain mineral rights to the land, the deed binding the heirs and assigns of the respective parties. Following the cases above cited, the Court held the reservation partook of the nature of an executory limitation, vesting no interest in the land and constituting an irrevocable restraint upon alienation of the land, even though the option was in form a reservation of a right to the grantor in the deed by which the land was conveyed.

<sup>2</sup> The common-law rule being that to be valid, the limitations must be so made that the estate not only *may*, but *must* vest within the prescribed period. *Hanley v. Kansas & T. Coal Co.*, 110 Fed. 62; *Andrews v. Lincoln*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103; *Donohue v. McNichol*, 61 Pa. 73; *Loyd v. Loyd's Ex'r*, 102 Va. 519, 46 S. E. 687; *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352; *Schettler v. Smith*, 41 N. Y. 328; *Buck v. Walker*, 115 Minn. 239, 132 N. W. 205.

It will be observed that Fry, J., in the Canal case rested his decision on the point that the option right was "presently" vested. The Gomm decision says the right or interest is "executory" to arise on an event which *might* not happen within the lawful period. The latter was also the view of the Court in *Barton v. Thaw*, (Pa.) 92 Atl. 312.

The fact that some of the interested parties are minors does not bring the case within the rule, *In re Campbell's Estate*, 149 Cal. 712, 87 P. 573.

<sup>3</sup> *Woodall v. Bruen*, (W. Va.) 85 S. E. 170.

Speaking of the rule, and the two lines of authorities, the Court said: "The rule itself, as well as the divergent interpretations thereof, rests upon considerations of public policy, undue restraint upon alienation of property being regarded as highly detrimental to the interests of society in general. According to one view, the general welfare in this respect is sufficiently protected by inhibition of suspension of the absolute power of alienation, or absolute suspension of such power, for an unreasonable period of time. Such suspension occurs when the situation of the property is such that nobody can sell or convey it until the lapse of that period. But for the rule, such condition could be created. It is unnecessary here to illustrate the methods of creating them. In the opinion of other jurists the rule goes further and condemns limitations that clog alienation and unduly restrain it for an unreasonable length of time, without absolute prevention thereof. So interpreted, it forbids practically all executory limitations, whether by will or deed, that do not vest within the time arbitrarily prescribed as being reasonable, a life or lives in being and 21 years and 10 months; and, even though the holders of the respective rights have it in their power to combine them to put the property on the market, the restraint upon alienation is deemed to be incompatible with the welfare of society in general. Such was the consideration in the *Starcher and Duty* cases. The rule is thus applied in England, Massachusetts, Maine, Pennsylvania, New Jersey, and Illinois, and the interpretation has the approval of Prof. Gray, author of a leading work on the subject."

SEC. 221. PERPETUITIES, CONTINUED.  
RULE UNDER STATUTES PROVIDING AGAINST SUSPENSION OF POWER OF ALIENATION.—Under statutes like those of New York,<sup>1</sup> which have been quite extensively copied by other states, the test is whether there are persons in being who unitedly by one instrument, or by several instruments, of conveyance, can convey a fee in possession to the land.<sup>2</sup> If there are such persons in being the rule is not offended. This is in accord with the reasoning of the Supreme Court of California in the Blakeman decision, which involved an option on land,<sup>3</sup> and is also in accord with the general rule on the subject as established by the Ameri-

<sup>1</sup> See Sec. 208, note 1.

The New York statute provides that every future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except that a contingent remainder in fee may be created on a prior remainder in fee, etc. And the statute defines what is the absolute suspension of the power of alienation by providing that it is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

<sup>2</sup> This rule also applies to personal property when the statute covers that kind of property. The test under the statute is not whether the interest is vested (which is the test at common law), but whether there are persons in being who unitedly or by several instruments can convey an absolute fee in possession; for under the statute an interest may be vested and still be within the statute.

<sup>3</sup> *Blakeman v. Miller*, 136 Cal. 138, 68 P. 587, 89 A. S. R. 120, the Court points out that the Gomm decision (Sec. 219, *supra*) is not inconsistent with the rule declared in that "all that was held was that the option to purchase at any time in the future beyond twenty-one years was void for remoteness" (twenty-one years absolute being the period when the limitation is not based on lives), *Andrews v. Lincoln*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103. See *Hoadley v. Beardsley*, (Conn.) 93 Atl. 535; *Buck v. Walker*, 115 Minn. 239, 132 N. W. 205, option.

can courts,<sup>4</sup> under the statutes referred to, and is also in accord with the English decisions prior to the Gomm decision.<sup>5</sup>

Justice Marshall of the Supreme Court of Wisconsin<sup>6</sup> said:

“Before the origin of the system in New York, as to real estate, these two ideas received attention in the English decisions: First, no future estate in land which can be released is too remote, as regards the land itself, to offend against the law prohibiting perpetuities; second, a future interest in land is too remote notwithstanding the title thereto is not tied up so as to prevent dealing therewith if it be in a trust required to be carried beyond the period of limitation fixed by law, as regards perpetuities in property. In *Gooch v. Gooch*, 3 De G. M. & G. 366, 381, the lord chancellor, giving the test to be applied at common law in determining whether the power of alienation is unduly suspended, said that the sole test was whether there were persons in being by whom a fee could be conveyed. *Gilbertson v. Richards*, 4 Hurl. & N. 277; *Canal Co. v. Cartwright*, 11 Ch. Div. 421; and *Avern v. Lloyd*, L. R. 5 Eq. 383,

<sup>4</sup> *Branson v. Bailey*, 246 Ill. 490, 92 N. E. 940; *Hubbel Trust*, In re, 135 Iowa 637, 113 N. W. 512, 13 L. R. A. (N. S.) 496; *Andrews v. Lincoln*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103, rule does not apply to vested estates; *Torpy v. Betts*, 123 Mich. 239, 81 N. W. 1094; *Stevens v. Annex Realty Co.*, 173 Mo. 511, 73 S. W. 505; *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57; *Thieler v. Rayner*, 190 N. Y. 546, 83 N. E. 1133, affirming 100 N. Y. S. 993, 115 App. Div. 626.

<sup>5</sup> *Birmingham Canal Co. v. Cartwright*, L. R., 11 Ch. Div. 421; *Tulk v. Moxhay*, 2 Ph. 774, 41 Eng. Reprint 1143, 15 Eng. Rul. Cas. 254; see *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352.

<sup>6</sup> *Becker v. Chester*, 115 Wis. 90, 91 N. W. 87, 650.

Voting pool on shares of stock and option to purchase, see Sec. 215.

are to the same effect. That doctrine can be easily traced back in the judicial history of England to *Washborn v. Downes*, 1 Cas. Ch. 213, decided in 1672, where this language was used:

“ ‘A perpetuity is where, if all that have interest join, and yet can not bar or pass the estate. But if the concurrence of all having the estate tail may be barred, it is no perpetuity.’ In *Railroad Co. v. Gomm*, *supra*, after reviewing the whole field of judicial history from the time of *Washborn v. Downes*, the conclusion was reached that decisions based thereon were contrary to the true policy of the law and wrong; that restraints upon alienation are aimed primarily at the prevention of perpetuities; that a trust in real estate, tying up the estate itself, may be within the limitations of the rule against perpetuities, notwithstanding there are persons in being competent to convey a full title in possession to the realty. When the view which finds its first definite expression in *Washborn v. Downes* (that so long as there are persons in being, no matter how numerous they may be, who by joining can convey a full title in possession to the realty, there is no offense against the doctrine of perpetuities) was supposed to be the law of England, the statutes of New York were framed; and that idea was made a part thereof so plainly that there is no good reason for going astray in respect thereto.”

SEC. 222. PERPETUITIES. RULE WHERE-BY NO TIME IS EXPRESSLY FIXED BY THE OPTION.—The cases we have been considering are those in which the option contract expressly

fixed the time limit of the option right. There are decisions holding that an option contract without time limit is void.<sup>1</sup> But such holding is against the weight of authority either on the ground of indefiniteness or as offending the rule against perpetuities. According to the weight of judicial authority, where no time limit is expressly fixed by the option contract for the exercise of the option, the law fixes a reasonable time, and what length of time is reasonable in a particular case, is a question of fact, or of law, depending on the circumstances.<sup>2</sup>

<sup>1</sup> *Trogden v. Williams*, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867; see *Broadway H. & S. v. Decker*, 47 Wash. 586, 92 P. 445.

An option given providing that the purchaser of bonds could "at any time" return them and receive back the price paid, does not import a perpetuity. The law fixes a reasonable time, *Brooks v. Trustee Co.*, 76 Wash. 589, 136 P. 1152.

See *Schroeder v. Gemeinder*, 10 Nev. 355, option to purchase land premises "at any time" lessee desired to sell.

See *Pearson v. Horne*, 139 Ga. 453, 77 S. E. 387, option to purchase when optionor decided to sell, and *Stay v. Tennille*, 159 Ala. 514, 49 So. 238, holding a "first refusal" and also agreement to sell, on death of any one of the several owners of stock, indefinite as to time, but implying that if complaint had alleged an offer, etc., it would have been sufficient.

<sup>2</sup> See Secs. 856, 857; also *Cummings v. Nielson*, 42 Utah 157, 129 P. 619; *Anse LaButte Oil Co. v. Babb*, 122 La. 415, 47 So. 754.

Power of sale to an executor in a will without time restriction does not suspend power of alienation, *FitzGerald v. City of Big Rapids*, 123 Mich. 281, 82 N. W. 56.

See, also, *Holmes v. Walter*, 118 Wis. 409, 95 N. W. 380, 62 L. R. A. 986, holding power of alienation not suspended when trustee has absolute power to sell and beneficiaries are all in being and can, by uniting convey the whole title.

Also not suspended when trustee is by consent of testator's adult children empowered to sell, *Stoiber v. Stoiber*, 57 N. Y. S. 916, 40 App. Div. 156; also *In re Cooper's Estate*, 150 Pa. 576, 24 Atl. 1057, 30 A. S. R. 829.

Power of trustees in deed of trust to sell at their "option" does not suspend power of alienation, even if never exercised, *Thatcher v. St. Andrews Church*, 37 Mich. 264.

An option fixing the time limit as at any time within twenty years, but within the term of a lease, is not void as being a suspension of the power of alienation.<sup>3</sup>

Where, in a contract between the owner of coal lands and a railway company, the owner agreed to develop the mines on his land and the company agreed to purchase the coal produced, at the ruling prices, not less than 100,000 tons per year, although the contract fixed no time it was to continue in force, the contract was, by implication, to terminate when the owner's coal became exhausted.<sup>4</sup>

SEC. 223. PERPETUITIES. LEASES AND LIKE INSTRUMENTS.—A covenant in a lease to renew indefinitely at the option of the lessee creates a perpetuity.<sup>1</sup> It does not appear in the decision last cited whether the covenant ran to the lessee, "his heirs and assigns." In those jurisdic-

<sup>2</sup> See, as to contract for deposit of stock with trust company by stockholder for six months not to be withdrawn without the consent of each stockholder, *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57.

<sup>3</sup> *Blakeman v. Miller*, 136 Cal. 138, 68 P. 587, 89 A. S. R. 120.

<sup>4</sup> *McKell v. Chesapeake etc. R. Co.*, 186 Fed. 39, 108 C. C. A. 141, affirming 175 Fed. 321, 99 C. C. A. 109; *Anse LaButte Oil etc. Co. v. Babb*, 122 La. 415, 47 So. 754, mineral lease and option.

Equity will not construe doubtful language in a contract so as to defeat the contract as in violation of the law against perpetuities, when it is susceptible of a construction which will validate the contract, *Rice v. Lincoln etc. R. Co.*, 88 Neb. 307, 129 N. W. 425.

<sup>1</sup> *Morrison v. Rossignol*, 5 Cal. 65.

A different conclusion was reached in Maryland, but this was by force of precedent: lease with option to purchase, *Hollander v. Central M. & S. Co.*, 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135.

tions where the lease is not assignable without express words of assignability a different rule obtains. Thus, where a lease contains a renewal clause binding only the parties to it and not their "heirs and assigns" it does not create a perpetuity.<sup>2</sup>

A contract to permit plaintiff's assignor to prospect defendant's land for mineral substances and, in case of success, to purchase the land from defendant, at a specified price, does not create a perpetuity.<sup>3</sup>

SEC. 224. PERPETUITIES. OPTION FOR LIFE OR FOR TERM OF YEARS.—According to the authorities, where the time limit is fixed with reference to lives in being (the number of which varies in the several states) the option does not offend the rule against perpetuities. Thus, an owner may agree that he will not sell his property during

<sup>1</sup> Claim that the renewal clause should be inserted in such subsequent lease, not allowed, *Sears v. St. John*, 18 Can. Sup. Ct. 702. See *Hope v. Gloucester*, 7 DeG. M. & G. 647, 25 L. J. Ch. 145, 44 Eng. Reprint 252 (1855); see *Bridges v. Hitchcock*, 5 Bro. P. C. 6, 2 Eng. Reprint 498 (1715); *Clough v. Cook*, (Del. Ch.) 87 Atl. 1017.

Under the New York statute a covenant for renewal is not void as suspending the power of alienation, because the giving of a lease does not prevent the alienation of the property, *Gomez v. Gomez*, 31 N. Y. S. 206, 81 Hun. 566. See *Thaw v. Gaffney*, (W. Va.) 83 S. E. 983.

<sup>2</sup> *Hudgins v. Bowes*, (Tex. Civ. App.) 110 S. W. 178; *Brush v. Beecher*, 110 Mich. 597, 68 N. W. 320, 64 A. S. R. 373; see *Thaw v. Gaffney*, (W. Va.) 83 S. E. 983.

<sup>3</sup> *Anse La Butte Oil Co. v. Babb*, 122 La. 415, 47 So. 754; *Buck v. Walker*, 115 Minn. 239, 132 N. W. 205; as to oil and gas leases, see *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101; *Owens v. Petroleum Co.*, (Tex. Civ. App.) 169 S. W. 192.

Covenant for renewal of lease distinguished from option to purchase contained therein on ground that the former creates vested estate in the lessee, *Starcher Bros. Cases*, Sec. 220.



his life time, or that a certain person shall have the right to say whether or not he will take it, at the owner's death, at a stipulated price.<sup>1</sup> Stockholders of a private trading corporation agreed that in the event of the death of any one or more of them, the remaining stockholders should have the option to purchase the shares of the decedent at their value, and it was held the limitation was not invalid, as an unlawful restraint on the power of alienation.<sup>2</sup>

At common law, a contingent future interest must become vested within a life or lives in being and twenty-one years, adding ten months in certain cases. At common law, a future contingent estate limited in duration by a term of years and not with reference to lives in being, is void, unless contained in a lease or other like instrument and sustained on the theory that the future estate is vested, or must, under the circumstances, vest during lives in being.<sup>3</sup>

Under the California statute, there is no legal objection to the length of the term of years so long as there are persons in being who can convey a fee in possession, but it is said it is extremely doubtful if the courts would specifically enforce an option where the election took place at a time unreason-

<sup>1</sup> *Elliott v. DeLaney*, 217 Mo. 14, 116 S. W. 494.

<sup>2</sup> *Fitzsimmons v. Lindsay*, 205 Pa. 79, 54 Atl. 488.

<sup>3</sup> Thus, if the option privilege was personal to the optionee so that if exercised at all it must be exercised by him during his lifetime, it is valid, see *In re Trotter's Will*, 93 N. Y. S. 404, 104 App. Div. 188, affirmed 182 N. Y. 465, 75 N. E. 305.

As to twenty-one years being the limitation when not based on lives, see note 3, Sec. 221.

ably remote.<sup>4</sup> However, in West Virginia it is held that an option to purchase land within 99 years, partaking, as it is said, of the nature of an executory limitation and vesting no immediate interest, is an unreasonable restraint on alienation and void.<sup>5</sup>

<sup>4</sup> *Blakeman v. Miller*, 136 Cal. 138, 68 P. 587, 89 A. S. R. 120.

<sup>5</sup> *Woodall v. Bruen*, (W. Va.) 85 S. E. 170.

## CHAPTER III.

### CONSIDERATION.

- Sec. 301. Option contract. Generally.
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- Sec. 303. Mutuality of promises.
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- Sec. 327. Decisions holding nominal sum of money insufficient.
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- Sec. 329. Nominal sum as consideration. Oil and gas leases and licenses.
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SECTION 301. OPTION CONTRACT. GENERALLY.—The law relating to option contracts as evolved by judicial decision<sup>1</sup> is based on the fact that the contract is supported by a consideration, or, in some jurisdictions, is under seal.<sup>2</sup> The rule that an option contract based on a consideration is a binding enforceable contract is now recognized and enforced in every jurisdiction. The decisions on this point are so numerous that we cite the leading cases only.<sup>3</sup>

1 An offer which could be ripened into a contract by acceptance before withdrawal by the offeree, proved of great benefit in commercial transactions, but it was unsatisfactory to the offeree, by reason of the established rule that the offer could be withdrawn by the party making it at any time before its acceptance, and the decisions show that the offer was usually withdrawn at a time when it was of most value to the party to whom it was made. This inconvenience gave rise to an endeavor to prevent withdrawal, and at the same time to leave the offeree free to accept or reject it within a fixed time. This purpose was accomplished by procuring from the offerer an obligation binding him to keep his offer open during the stipulated time, the Courts holding that when this obligation was supported by a consideration, the offerer could not withdraw it during the time limit, *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723.

2 *Johnson v. Lumber Co.*, 163 Fed. 249, 89 C. C. A. 632; as to seal, see Sec. 332.

3 *Copple v. Aigeltinger*, 167 Cal. 706, 140 P. 1073; *Walter G. Reese Co. v. House*, 162 Cal. 740, 124 P. 442; *Larned v. Wentworth*, 114 Ga. 208, 39 S. E. 855; *Black v. Maddox*, *supra*; *Herman v. Babcock*, 103 Ind. 461, 3 N. E. 142, lease; *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535; *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; *New England Box Co. v. Prentiss*, 75 N. H. 246, 72 Atl. 826; *Myers v. Metzger*, 61 N. J. Eq. 522, 48 Atl. 1113; *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687; *Barnes v. Hustead*, 219 Pa. 287, 68 Atl. 839; *Bradford v. Foster*, 87 Tenn. 4, 9 S. E. 195, overruling earlier decisions; *National Oil Co. v. Teel*, 95 Tex. 586, 68 S. W. 979; *Walker v. Bamberger*, 17 Utah 239, 54 P. 108; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881, 1 Ann. Cas. 986; *Baker v. Shaw*, 68 Wash. 99, 122 P. 611.

On the other hand, a mere unaccepted offer, not under seal, or not supported by a consideration, is *nudum pactum*,<sup>4</sup> notwithstanding it is expressly recited in the writing that it is irrevocable.<sup>5</sup>

<sup>3</sup> Pollock v. Brookover, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; Tibbs v. Zirkle, 55 W. Va. 49, 46 S. E. 701, 104 A. S. R. 977, 2 Ann. Cas. 421; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94, the consideration need not be expressed in the writing; Frank v. Stratford-Handcock, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; Couch v. McCoy, 138 Fed. 696; Marthinson v. King, 150 Fed. 48, 82 C. C. A. 360; Johnston v. Trippe, 33 Fed. 530; Frank v. Schnuettgen, 187 Fed. 515, 109 C. C. A. 281.

There must be some consideration on which the "finger can be placed," Elliott v. DeLaney, 217 Mo. 14, 116 S. W. 494; but it need not be expressed in the writing, Bean v. Burbank, 16 Me. 458, 33 Am. Dec. 681; and may be paid after the execution of the option, Cummins v. Beavers, *supra*.

"The two things (option and offer) should not be confused. In the one case (option) there is a valid contract, based on a consideration, to allow the offer or proposition to remain open for acceptance until the time specified. In the other case (offer), there is a mere offer or proposition which is not a contract until acceptance," Prior v. Hilton & D. Lumber Co., 141 Ga. 117, 80 S. E. 559.

A covenant to pay money as consideration for an option is a contract subject to the general rules pertaining to such engagements, Reilly v. Steinhart, 146 N. Y. S. 534.

In Boston etc. R. Co. v. Bartlett, 3 Cush. (Mass.) 224, it is said (speaking of the right to withdraw an offer without consideration), that a different doctrine prevails in France, Scotland, and Holland, in which countries it is held that whenever an offer (without consideration) is made granting a party a certain time within which to decide whether he will accept it or not, the party making the offer can not withdraw it before lapse of the appointed time.

The common-law rule obtains under the Louisiana Code, Kirby etc. Co. v. Burnett, 144 Fed. 635, 75 C. C. A. 437.

<sup>4</sup> Borst v. Simpson, 90 Ala. 373, 7 So. 814; Cahaba Coal Co. v. Veitch, 186 Ala. 220, 65 So. 75; Brown v. San Francisco Sav. Union, 134 Cal. 448, 66 P. 592; Goodman v. Spurlin, 131 Ga. 588, 62 S. E. 1029; Litz v. Goosling, 93 Ky. 185, 19 S. W. 527, 14 Ky. L. Rep. 91, 21 L. R. A. 127; Bean v. Burbank, 16 Me. 458, 33 Am. Dec. 681; Davis v. Petty, 147 Mo. 374, 48 S. W. 944; Axe v. Tolbert, 179 Mich. 556, 146 N. W. 418; Warren v. Costello, 109 Mo. 338, 19 S. W. 29, 32 A. S. R. 669; Tidball v. Challburg, 67 Neb. 524, 93 N. W. 679; Houghwout v. Boisabuin, 18 N. J. Eq. 315; Burnet v. Bisco, 4 Johns. (N. Y.) 235;

SEC. 302. RULE AT COMMON LAW.—At common law, every contract not under seal requires a valuable consideration to support it.<sup>1</sup> But the consideration need not consist of money actually passing at the time. The consideration may consist of a real benefit to the promisor, or a real detriment suffered by the promisee, or it may arise out of mutual promises of the parties.<sup>2</sup>

<sup>4</sup> *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 932, 934; *Sprague v. Schotte*, 48 Ore. 609, 87 P. 1046; *Connor v. Renneker*, 25 S. C. 514; *Faulkner v. Hebard*, 26 Vt. 452; *Smith v. Reynolds*, 8 Fed. 696, 3 McCrary 157.

Upon acceptance of a mere offer before withdrawal the price named constitutes the consideration, *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485; see *Walter G. Reese Co. v. House*, 162 Cal. 740, 124 P. 442.

“The consideration makes a right out of what, in the other case (offer) is a privilege merely,” *Gustin v. School Dist.*, 94 Mich. 502, 54 N. W. 156, 34 A. S. R. 361.

<sup>5</sup> *Carton v. Wilson*, 13 Ont. L. Rep. 412.

<sup>1</sup> Bills of exchange and promissory notes are said to be exceptions to the rule, but, as to such paper, and now, in many states, as to written as distinguished from oral contracts, the writings import consideration.

<sup>2</sup> In *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 753, 3 L. R. A. 94, it is said the consideration for a promise on the part of the optionor to leave an offer open for a specified time “may consist of some benefit to the promisor; or some loss, injury or inconvenience to the promisee; or some money, or other thing of value, given, exchanged or paid; or of some promise or undertaking of the promisee to pay, give, or exchange, such thing of value; or to incur some trouble or expense; or do or not to do some lawful act; or to surrender, abandon, or suspend the exercise of some legal right,” and at the same page the court adds that “it is not necessary that a benefit should inure to the person making the promise. It is sufficient if something flows from the person to whom it is made and that the promise is the inducement to the transaction.”

Also *Litz v. Goosling*, 93 Ky. 185, 19 S. W. 527, 14 Ky. L. Rep. 91, 21 L. B. A. 127.

This excludes, of course, a benefit to which the promisor is lawfully entitled as well as a detriment, which the promisee is lawfully bound to suffer.<sup>3</sup>

In accordance with common law rules, the consideration for an option contract may consist, first, of money paid at the time by the optionee to the optionor, secondly, of any other thing of value given at the time by the optionee to the optionor for the option privilege, or thirdly, of some forbearance, detriment, loss, or responsibility, given, suffered, or endured, by the optionee.<sup>4</sup>

It may, also, consist of a promise on the part of the optionee to the optionor for the option privilege, but the promise to constitute a consideration must be with reference to some thing, the performance of which will be a real benefit to the optionor, or a real detriment to the optionee, and also, the promise must be one which is enforceable by the optionor, since, under the rule, a promise is not a consideration for a promise unless there is mutuality of promises.<sup>5</sup>

<sup>2</sup> "Benefit," within the rule, means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled, and "detriment" means that the promisee has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled, *Harp v. Hamilton*, (Tex. Civ. App.) 177 S. W. 565.

<sup>3</sup> *Wescott v. Mitchell*, 95 Me. 377, 50 Atl. 21.

<sup>4</sup> Thus, an agreement by the president of a stock company, individually, to take the stock purchased, off the hands of the purchaser, after six months' notice, at par, the agreement being the inducement to purchase, is not invalid for want of consideration, since the company received a benefit from the agreement and the purchaser did what he otherwise would not have done but for the promise, *Moench v. Hower*, 137 Iowa 621, 115 N. W. 229.

<sup>5</sup> *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541.

## SEC. 303. MUTUALITY OF PROMISES.—

We have seen that in the law of contracts, a promise is a sufficient consideration for a promise, and applying this rule to option contracts, it follows that a promise on the part of the optionee is a sufficient consideration for a promise on the part of the optionor to keep his offer open for a specified time. But to have this effect the promise must, in point of time, be concurrent and mutual.<sup>1</sup> By this it is not meant the promise of the optionee must, at the time, be executed, that is, performed, but the promise must be such as to bind him to performance at the instance of the optionor.<sup>2</sup>

<sup>1</sup> *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Tucker v. Woods*, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305.

In *Taber v. Dallas County*, 101 Tex. 241, 106 S. W. 332, it is held when, in the contract, there is a promise to convey and a promise by the purchaser to pay the agreed price, mutuality is created which is not destroyed because of a stipulation providing the purchaser could terminate the contract by refusing to pay interest for 60 days.

In *Eclipse Oil Co. v. So. Penn. Oil Co.*, 47 W. Va. 84, 34 S. E. 923, 929, it is stated if the agreement is not presently mutual the party not bound can not avail himself of it as obligatory upon the other, nor render it obligatory upon the other, by any subsequent act of his own, without the consent of the other.

<sup>2</sup> *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541; *Wardell v. Williams*, 62 Mich. 50, 28 N. W. 796, 800, 4 A. S. R. 814.

*Seyferth v. Groves & L. R. R. Co.*, 217 Ill. 483, 75 N. E. 522, payment of option consideration postponed.

*Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881, 1 Ann. Cas. 986; consideration for option may be paid after its execution.

*Grabenhorst v. Nicodemus*, 42 Md. 236, payment of consideration deferred one year.

*Taylor v. Newton*, 152 Ala. 459, 44 So. 583, subsequent part payment on price furnishes consideration for option.

In *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228, there is an intimation that the recital of a consideration in the option is a promise to pay it and, therefore, is sufficient, though delayed; see also *Bibelhausen v. Bibelhausen*, (Wis.) 150 N. W. 516.



Again, the promise of the optionee must be with reference to some act or forbearance which, in law, amounts to a real benefit to the optionor or a real detriment to the optionee. The decisions next to be cited aptly illustrate and sustain these general rules. It needs to be added, however, that the mutuality we are speaking of is that mutuality of agreement required by law to exist at the time of the making of the promises so as to raise a real option contract and thus legally to prevent the withdrawal of the option privilege by the optionor before the expiration of the time limit. In a pure offer there is no mutuality of obligation until acceptance, whereupon the contract thus raised becomes bilateral, that is, the promises become mutual and, therefore, binding upon the respective parties.<sup>3</sup>

**SEC. 304. MUTUALITY OF PROMISE AND CONDITION PRECEDENT.**—The promise of the optionee which we are considering is one which binds him to do, or forbear to do, a particular thing.

<sup>2</sup> A consideration mentioned in a contract which is not legally enforceable is equivalent to no consideration, *Eclipse Oil Co. v. So. Penn. Oil Co.*, 47 W. Va. 84, 34 S. E. 923, 929; also *Litz v. Goosling*, 93 Ky. 185, 19 S. W. 527, 14 Ky. L. Rep. 91, 21 L. R. A. 127.

If the promise on the part of the optionee is the performance of some personal act which because of this fact is not legally enforceable against him, then mutuality does not arise until the act has been fully performed, *Smith v. Cauthen*, 98 Miss. 746, 54 So. 844, advertising property by agent given option to purchase; promise of wife to convey her homestead, *Williams v. Graves*, 7 Tex. Civ. App. 356, 26 S. W. 334.

<sup>3</sup> Upon acceptance before withdrawal, the price named for the optioned property constitutes the consideration, *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485; *Walter G. Reese Co. v. House*, 162 Cal. 740, 124 P. 442.

The performance of the promise is not optional or discretionary with the optionee. Such a promise must, therefore, be distinguished from a stipulation in an option contract requiring the optionee to do a particular act as a condition of his right to exercise the option privilege. In the latter case, the optionee is not obligated to perform the act, and under the terms of the option contract as usually made, if he fails to do so, he loses his option privilege, whereas, a promise by the optionee whereby he obligates himself to do a particular act such as to pay taxes, to advertise the property, etc., must be fulfilled, irrespective of the exercise of the option privilege. In the latter case, the absolute promise of the optionee is a sufficient consideration to support the option contract. In the former, there is an entire lack of present consideration, and whether the promise may be turned into a consideration, or give rise to mutuality of promises, depends upon the fact of its performance, an act which, of course, takes place after the execution of the option contract.

#### SEC. 305. MUTUALITY. SAME. CASES.—

Thus, a land owner gave another an option to select and purchase a portion of his land at a certain price, on condition that the selection be made by a given time, and upon the further condition that the optionee pay the taxes and improve a portion of the lands selected, upon performance of which the owner agreed to convey. The optionee entered into possession and commenced to improve the land, and

it was held these acts furnished mutuality and consideration for the agreement to convey.<sup>1</sup>

So, where defendant sold land to plaintiff, the conditions of the agreement being that if plaintiff constructed a proposed railroad and had trains running within a year, then defendant should deed the property to plaintiff upon payment of the price then to become due. Plaintiff, by the agreement, was authorized to take possession and did so, and the road was completed, and trains were running within the year, and it was held that thereby the contract became mutual.<sup>2</sup>

The facts vary in particular cases but the same rule applies. Thus, where one party agrees to assign a claim upon delivery to him of certain notes, by a certain day, and the notes are then delivered, the offer is thereby accepted, and the contract completed. The acceptance constitutes a legal consideration for the engagement, and, of course, makes the contract mutual.<sup>3</sup>

Where conveyance of mining property was to be made upon payment of certain sums out of the property, the grantee is not entitled to a deed, though given possession of the mine with a license

<sup>1</sup> Perkins v. Hadsell, 50 Ill. 216, distinguishing Boucher v. Van Buskirk, 9 Ky. (2 A. K. Marsh) 345, in that the improvements there relied on as a consideration were not made.

See Boyd v. Brinckin, 55 Cal. 427, where defendant settled on the land and filed his application to purchase as directed by the circular of plaintiff, having made valuable improvements, and it was held such acts created a valid contract.

<sup>2</sup> Byers v. Denver C. R. Co., 13 Colo. 552, 22 P. 951.

<sup>3</sup> Cutting v. Dana, 25 N. J. Eq. 265; see Boyd v. Brinckin, *supra*; Laning v. Cole, 4 N. J. Eq. 228.

to extract ore, until performance of the condition.<sup>4</sup> So, also, where an oil lease is made in consideration of a payment to be made in advance for delay in commencing development operations, the payment in advance is a condition precedent to the existence of any obligation on the part of the lessor under the lease.<sup>5</sup>

SEC. 306. MUTUALITY. OFFERS. PARTIAL PERFORMANCE.—With reference to a pure offer, mutuality arises only upon and by timely acceptance of the offer. The acceptance has the effect of giving mutuality and furnishing consideration. The acceptance, by the terms of the offer, may consist of a mere notice, or it may, by the terms of the offer, consist of notice and some other act touching the partial or full performance of the offer by the offeree, or of some collateral matter.

Where the acceptance is the act alone of giving notice, the case is simple. The offer is turned into a binding and enforceable contract having mutuality and consideration by the simple act of giving notice. Where, however, the acceptance consists not only of giving notice but also of the performance of some act, or series of acts, or consists alone of the performance of some act, or of a series of acts, the question arises whether there must be a full and complete performance by the offeree in order to give mutuality and consideration.

<sup>4</sup> *Smith v. Jones*, 21 Utah 270, 60 P. 1104; also *Waterman v. Banks*, 144 U. S. 394, 36 L. Ed. 479, 12 S. Ct. 646.

<sup>5</sup> *Jennings-Heywood Oil Synd. v. Houssiere-Latreille Oil Co.*, 119 La. 793, 44 So. 481.

Since the performance by the offeree is optional, it would seem full performance is required except in those cases where the performance of one of a series of acts, or commencing to perform the particular act, has the effect of making an acceptance<sup>1</sup> or of working an estoppel.<sup>2</sup>

SEC. 307. MUTUALITY. SAME. CASES.—As illustrating and applying the rules of the preceding section, it is held, under an option for the purchase of land, providing that upon payment of a certain sum and receipt of conveyance, plaintiff was to deliver to defendant a promissory note secured by mortgage, for the balance of the price, there is no mutuality until final payment of the full price, where the contract contained a provision that the only penalty for failure or refusal, at any time, to complete the purchase, was the forfeiture, as liquidated damages, of all sums previously paid.<sup>1</sup>

A contract providing that on payment of two notes at their respective maturities, the maker should have an exclusive option to purchase certain lands at a fixed price, is revocable by the payee

<sup>1</sup> *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 A. S. R. 341.

But ordinarily it is the binding promise itself and not its performance that constitutes the consideration, except in those cases where performance on one side is made a condition precedent to performance on the other, see *United & G. R. Mfg. Co. v. Conard*, 80 N. J. L. 286, 78 Atl. 203.

<sup>2</sup> As to estoppel, see *Taber v. Dallas County*, 101 Tex. 241, 106 S. W. 332.

<sup>1</sup> *Rude v. Levy*, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 91, 127 A. S. R. 123, the theory of this case being that the damage clause made the agreement an option; see also *Smith v. Jones*, 21 Utah 270, 60 P. 1104.

upon failure to pay the second note, though the first note had been fully and timely paid.<sup>2</sup>

Under a continuing offer to sell a certain quantity of whiskey for each year of a term of five years, acceptance for any one year, or any part of the whiskey less than the whole, does not give the contract mutuality.<sup>3</sup>

On the other hand, it is held that acceptance by a manufacturer, of an order to deliver to plaintiff, all the goods of a specified class that plaintiff may need during the season, is merely an offer to deliver the goods, which offer the manufacturer has no right to withdraw as to orders placed before withdrawal, and especially where he has filled an order at the price specified, and thus had the benefit of a sale.<sup>4</sup>

SEC. 308. MINING OPTIONS AND LICENSES.—A contract provided that plaintiff without payment, should be allowed to enter into possession of a mine owned by defendant for the purpose of developing the same. Such development contemplated the expenditure of money. The net proceeds of ore extracted were to be turned over to the defendant. The contract also gave plaintiff an option to purchase the mine for a certain sum, payable on or before a certain time. In the event of

<sup>2</sup> Title I. & T. Co. v. King L. & I. M. P. Co., 19 Cal. App. 458, 126 P. 372.

<sup>3</sup> Rehm-Zeiber Co. v. F. G. Walker Co., 156 Ky. 6, 160 S. W. 777, distinguishing Louisville & N. R. Co. v. Coyle, 123 Ky. 854, 97 S. W. 772, 99 S. W. 237, 30 Ky. L. Rep. 201, 8 L. R. A. (N. S.) 433, 124 A. S. R. 384.

<sup>4</sup> Cooper v. Lansing Wheel Co., 94 Mich. 272, 54 N. W. 39, 34 A. S. R. 341.

purchase, the net proceeds of the ore turned over to the plaintiff were to be credited on the purchase price. Plaintiff entered into possession of the mine and made outlay of labor and money in operating it, and it was held there was sufficient consideration to support the option.<sup>1</sup>

SEC. 309. MINING OPTIONS AND LICENSES, CONTINUED.—On the other hand, an executory gas and oil lease which provides for its surrender at any time, without payment of rent or fulfillment of any of its covenants on the part of the lessee, creates a mere right of entry at will, which may be terminated by the lessor at any time before its execution by the lessee.<sup>1</sup>

In another case, a lease granted the lessee the right to mine for oil and gas so long as the same were produced and the royalties and rentals were paid, but did not bind the lessee to perform any obligation, and it was held there could be no mutu-

<sup>1</sup> *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426; also *Hall v. Abraham*, 44 Ore. 477, 75 P. 882, in both of these cases possession and development of the mines were in pursuance of the terms of the agreements.

<sup>1</sup> *Eclipse Oil Co. v. So. Penn. Oil Co.*, 47 W. Va. 84, 34 S. E. 923; in this case the lessee did nothing under the lease except to pay the commutation rental in lieu of development work as provided for in the lease. The Court at page 929 of the Reporter said: "The only considerations mentioned in the lease are the royalties and rentals on oil and gas to be produced and the commutation for failure to complete a well. The plaintiff was not bound to complete a well at any given time or during the life of the lease, so as to produce oil, royalties or gas rentals. . . . It was entirely optional to bore or not, or pay or not. He was bound to do neither, but could decline to do both." *McMillan v. Philadelphia Co.*, 159 Pa. 142, 28 Atl. 220, and *Jackson v. O'Hara*, 183 Pa. 233, 38 Atl. 624, are distinguished on the ground that the lessee was bound either to drill or to pay rental; see also *Smith v. Guffey*, 202 Fed. 106, 120 C. C. A. 436.

ality until the lessee had done some act under the lease so as to bind him to exercise the option.<sup>2</sup>

SEC. 310. PERMIT TO SETTLE ON RAILROAD LANDS.—The defendant desired to make improvement of certain of its land which it expected to acquire under the land grant acts, and issued circulars under which persons desiring to settle upon the lands could do so. Plaintiff's assignor applied for a permit and one was issued to him. A few days afterwards and before plaintiff's assignor had entered upon the land or done anything under the permit, defendant revoked the permit. Later on, plaintiff's assignor, disregarding the revocation, entered upon the land and "broke up" a part of it against the wishes and express order of the defendant. The question was, whether defendant had a right to revoke the permit, and it was held defendant had such a right because there was no promise on the part of plaintiff's assignor to enter and improve the lands, the revocation having been made before plaintiff's assignor entered upon or improved the land.<sup>1</sup>

<sup>2</sup> Cortelyou v. Barnsdall, 236 Ill. 138, 86 N. E. 200, s. c. 140 Ill. App. 163. Also Federal Oil Co. v. Western Oil Co., 112 Fed. 373, and under such kind of lease an agreement to complete second well does not furnish consideration.

See also Witherspoon v. Staley, (Tex. Civ. App.) 156 S. W. 557; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; Illinois Kaolin Co. v. Goodman, 252 Ill. 99, 96 N. E. 867; Goodson v. Vivian Oil Co., 129 La. 955, 57 So. 281.

<sup>1</sup> Ellsworth v. So. Minn. Ry. Ex. Co., 31 Minn. 543, 18 N. W. 822, distinguishing Boyd v. Brinckin, 55 Cal. 427, by the fact that there was an acceptance of the offer by the acts of entering on and improving the land in accordance with the terms of the offer. In the Minnesota case the court said it would not be presumed, as a matter of law, there was a promise by plaintiff's assignor from the mere fact that he applied "or and received the permit."



**SEC. 311. CONTINGENT PROMISES.**—It is well to note here there are some decisions holding that a contingent promise can form a consideration for a promise. Thus, in a Tennessee case<sup>1</sup> it is held a stipulation on the part of one party to deliver salt when called on by the other, and a stipulation on the part of the latter to pay for the salt when delivered, constitute a mutual and valid agreement founded upon sufficient consideration. It will be observed that, under this agreement, it was optional with the purchaser to call for the salt and, therefore, in the absence of an order for the salt, the agreement was not enforceable against the purchaser. The cited decision is not in accord with the weight of authority. Had the agreement by its terms bound the purchaser to take all, or a certain quantity of salt, then undoubtedly there would have been mutuality and consideration to support the agreement.<sup>2</sup>

A stipulation in an option contract for payment of the price for the property, or a royalty for its use, and the like, becomes binding and enforceable

<sup>1</sup> *Cherry v. Smith*, 22 Tenn. 19, 39 Am. Dec. 150, the language of the court supports the statement in the text, but the facts seem to show there was an order for the salt and if so, the case was correctly decided; see also *Hoffman v. Maffioli*, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427.

<sup>2</sup> *Rehm-Zeiher Co. v. F. G. Walker Co.*, 156 Ky. 6, 160 S. W. 777; *Dailey Co. v. Clark Can Co.*, 128 Mich. 591, 87 N. W. 761; *Hickey v. O'Brien*, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 A. S. R. 227; *Minn. L. Co. v. White Breast Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; *McCaw Mfg. Co. v. Felder*, 115 Ga. 408, 41 S. E. 664; *Parks v. Griffith*, 123 Md. 233, 91 Atl. 581; *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541; *Sheffield Furnace Co. v. Hull C. & C. Co.*, 101 Ala. 446, 14 So. 672; *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 A. S. R. 341; *Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67.

only upon election. In such cases the stipulation is not a promise within the rule of mutuality. Thus, defendant gave plaintiff a written proposal to allow plaintiff to print books from its stereotype plates upon payment of a royalty. The proposal was not accepted and consequently the stipulation for payment of the royalty did not furnish a consideration for the proposal.<sup>3</sup>

The same rule obtains under a gas and oil lease where a royalty was agreed to be paid.<sup>4</sup>

SEC. 312. IMPROVEMENTS CONSTITUTING ELECTION OR RAISING ESTOPPEL.— Unless, by the terms of the option contract, the optionee is obligated to improve the optioned property, or has been promised an option if he makes the improvements, it would seem, on principle, that the mere making of improvements does not furnish a consideration to support the option contract.<sup>1</sup> While this is true as a general rule, still the effect of making improvements and of performing other like acts, under particular circum-

<sup>3</sup> Collier v. Trow's etc. Co., 1 N. Y. S. 844, 49 Hun. 147.

In Taylor v. Newton, 152 Ala. 459, 44 So. 583, it is held that although the option is without consideration at the time it was given, still if the optionor accepts part payment on the price before expiration of the time limit, he can not then withdraw.

In Rice v. Gibbs, 33 Neb. 460, 50 N. W. 436, there is a passing remark that the stipulation to pay the price furnished the requisite consideration for the option, but the remark is obiter and unsupported by authority.

<sup>4</sup> Davis v. Riddle, 25 Colo. App. 162, 136 P. 551; Smith v. Guffey, 202 Fed. 106, 120 C. C. A. 436.

<sup>1</sup> Gordon v. Darnell, 5 Colo. 302; Clarno v. Grayson, 30 Ore. 111, 46 P. 426, 429.

stances, may amount to an election to purchase on the one hand, or on the other, place the optionee in a position to invoke the equitable rule of estoppel against the optionor. In either of the above cases, the result is much the same as if, in the first instance, the option contract had been supported by a consideration, provided, of course, that, prior to the act of the optionee which constitutes the election, or raises the estoppel in his favor, the optionor has not withdrawn the option privilege.

Thus, where the optionee constructed buildings, sank a well, kept the fences in repair and paid the taxes, it was held such acts constituted a sufficient consideration to support the option contract.<sup>2</sup>

SEC. 313. INVESTIGATION OF PROPERTY, ETC.—The mere fact the optionee has incurred expense in the investigation and examination of the optioned property, does not constitute a consideration for the option contract,<sup>1</sup> where the contract imposes no such condition and the optionee made the investigation for his own information.<sup>2</sup>

<sup>2</sup> *Mix v. Baldue*, 78 Ill. 215, holding the acts stated in the text gave the agreement mutuality, but the facts were such that the court was justified in holding the optionor estopped.

<sup>1</sup> *Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874; *Axe v. Tolbert*, 179 Mich. 556, 146 N. W. 418; *Bosshardt & Wilson Co. v. Crescent Oil Co.*, 171 Pa. 109, 32 Atl. 1120.

<sup>2</sup> *Comstock Bros. v. North*, 88 Miss. 754, 41 So. 374; *Gillespie v. Edmonston*, 11 Hump. (Tenn.) 553, option on slave; see *Penn. Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. 22, formation, etc., of corporation.

Mere receiving of writing (exclusive authority to sell) and trying to sell is not consideration, *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669, 19 A. S. R. 205.

An option was given on a vessel and contemplated an examination of the vessel before acceptance. The option, however, was not conditioned that the owner would sell absolutely if the vessel was found as represented. Nor, was the purchaser bound to purchase if he made the examination. After the purchaser had incurred the expense of employing an expert to make the examination and before acceptance, the owner withdrew the option, and it was held the owner had such right, as the examination by the purchaser did not inure to the owner's benefit, and, therefore, did not constitute any consideration for the option contract.<sup>3</sup>

SEC. 314. STIPULATION IN OPTION AGREEMENT BINDING OPTIONEE TO PERFORM.—Clearly, under the rule, a promise in the agreement binding on the optionee to perform some act, the performance of which will be a real benefit to the optionor or a real detriment to the optionee, furnishes sufficient consideration for the agreement. Thus, an agreement giving an option to purchase lands, and providing that the optionee shall, during the term, build a house on the land and pay taxes thereon, furnishes a good

<sup>3</sup> *Ganss v. Company*, 110 N. Y. S. 176, 125 App. Div. 760. The court said: "Any other construction of the option would destroy the legal character of the option . . . and make it a binding contract of sale without acceptance, simply upon the holder's doing some act or expending some money, however, little, in the course of his inspection to determine whether or not he held a desirable offer."

Also *Peacock v. Deweese*, 73 Ga. 570, testing for minerals; also *Gordon v. Darnell*, 5 Colo. 302, taking possession without objection from optionor.

Tests for oil, *Illinois Kaolin Co. v. Goodman*, 252 Ill. 99, 96 N. E. 867.

and sufficient consideration to support the option.<sup>1</sup> An oil and gas lease obligating the lessee to sink one or more wells within eighteen months and to commence work on the first well within six months from the date of the contract, is based on a sufficient consideration.<sup>2</sup>

SEC. 315. STIPULATION TO REPURCHASE OR RESELL.—A provision in a contract for the sale and purchase of land obligating the vendee to reconvey to the vendor on certain contingencies, is valid. The consideration for such provision exists in the original agreement to convey.<sup>1</sup>

A land company entered into a contract with a sales company by which the latter was given the right to sell the land upon certain terms and conditions and within a certain time. The contract further provided that if the land was not all sold within the stipulated time the sales company agreed to purchase the unsold portions, at the option of the land company, and it was held the several provisions of the agreement were depen-

<sup>1</sup> *Stansbury v. Fringer*, (Md.) 11 Gill & J. 149; see *Gordon v. Darnell*, 5 Colo. 302.

<sup>2</sup> *Great Western Oil Co. v. Carpenter*, 43 Tex. Civ. App. 229, 95 S. W. 57, distg. *National Oil etc. Co. v. Teel*, (Tex. Civ. App.) 67 S. W. 545, affirmed in 95 Tex. 586, 68 S. W. 979.

<sup>1</sup> *Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687; *Rohling v. Thole*, 256 Ill. 425, 100 N. E. 138.

But this rule does not apply to option to redeem from purchaser on execution sale, *Mers. v. Insurance Co.*, 68 Mo. 127.

dent and furnished "ample consideration" for the option agreement in favor of the land company.<sup>2</sup>

Where a deed is made conveying land for a certain price and, at the same time and for the same consideration, a separate agreement is made by the grantors in the deed, to convey to the grantee an adjacent lot under an option to the grantee to have the first privilege of purchasing, at the fair market price if the grantor sells, the deed and agreement will be construed as one contract and as furnishing a consideration for both agreements.<sup>3</sup>

SEC. 316. SAME. SHARES OF STOCK.—An agreement by a subscriber to stock to give defendant a preferred right to buy it, is a sufficient consideration for an agreement of defendant to pay dividends on the stock and, at the subscriber's option, to buy the stock, the promise of the one being an adequate consideration for the promise of the other.<sup>1</sup>

Where a number of persons, for the purpose of inducing others to subscribe for capital stock in a manufacturing company, in which all such persons were interested, executed an agreement stipulating upon thirty days' notice to pay each sub-

<sup>2</sup> Wilcox etc. Co. v. Stewart, 107 Minn. 85, 119 N. W. 504; also Sixta v. Land Co., 157 Wis. 293, 147 N. W. 1042.

Raiche v. Morrison, 47 Mont. 127, 130 P. 1074, s. c. 37 Mont. 244, 95 P. 1061, option to repurchase shares of stock; also Cothran v. Witham, 123 Ga. 190, 51 S. E. 285.

<sup>3</sup> Myers v. Metzger, 61 N. J. Eq. 522, 48 Atl. 1113, reversed on other grounds, 63 N. J. Eq. 779, 52 Atl. 274; see Rice v. Lincoln etc. R. Co., 88 Neb. 307, 129 N. W. 425.

<sup>1</sup> Vickery v. Maier, 164 Cal. 384, 129 P. 273.

scriber par value for his stock, the fact that the makers of such agreement were residents of the town in which the manufacturing establishment was to be located, interested in its growth and development, and jointly interested as subscribers in the furtherance of the common undertaking, was, in law, a sufficient consideration to support the agreement.<sup>2</sup>

A contract, whereby one party agreed to pay the other eight per cent on the stock of the latter in a corporation, from date of issue of stock to date of purchase, provided such stock did not pay that amount of interest or better, and agreed to purchase the stock at any time the seller wished to dispose of it, at par value, within one year from the date of the agreement, and whereby the other was to permit the buyer to control and vote the stock from and after the date of the agreement, in all meetings of stockholders, the seller to be paid by the buyer a full return of all money invested by him in the stock with interest thereon, is not unilateral.<sup>3</sup>

SEC. 317. DOUBLE AGREEMENTS.—It is a rule in the law of contracts that where a contract consists of several distinct and separate stipulations on one side and a legal consideration is stated on the other, it must be considered that the entire contract was in contemplation of the parties and that each particular stipulation formed one of the inducements therefor, and that, therefore, it is

<sup>2</sup> *Rogers v. Burr*, 105 Ga. 432, 31 S. E. 438, 70 A. S. R. 50.

<sup>3</sup> *Hardin v. Case*, 134 Ga. 813, 68 S. E. 648.

supported by the consideration.<sup>1</sup> This rule is particularly applicable to agreements granting options.

Accordingly, where plaintiff, by one entire contract, purchased of defendant, a certain quantity of logs, at a certain price, and, also, purchased of defendant another quantity of logs, at another agreed price, but reserved the right to refuse to accept the latter quantity unless they arrived at the boom at a certain time, the price for the first quantity of logs furnished consideration for the option upon the second quantity.<sup>2</sup>

So, where the agreement was to convey a certain tract of land with option to the purchaser to take additional land, the money consideration paid by the optionee was a sufficient consideration for both the agreement to convey and the option.<sup>3</sup>

SEC. 318. OPTION AS CONSIDERATION FOR OTHER CONTRACT.—Plaintiff gave defendant an option to purchase his interest in shares of a certain railroad corporation. Subsequently, by the terms of a contract which recited it was explanatory and supplemental to the option, the defendant

<sup>1</sup> Stansbury v. Fringer, (Md.) 11 Gill & J. 149; Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150, 153.

<sup>2</sup> Harper v. Runner, 85 Neb. 343, 123 N. W. 313; Bacon v. Kentucky Cent. Ry. Co., 95 Ky. 373, 25 S. W. 747, 16 Ky. L. Rep. 77; Staples v. O'Neal, 64 Minn. 27, 65 N. W. 1083.

<sup>3</sup> Rice v. Lincoln etc. R. Co., 88 Neb. 307, 129 N. W. 425; also Myers v. Metzger, 61 N. J. Eq. 522, 48 Atl. 1113, reversed on other grounds in 63 N. J. Eq. 779, 52 Atl. 274.

Also Heyward v. Willmarth, 84 N. Y. S. 75, 87 App. Div. 125, lease with option on adjoining tract.

Also Harper v. Runner, *supra*, lease and option.



agreed to purchase and pay for the same shares. The defendant breaching the second contract, plaintiff brought suit and the defense was want of consideration. It was held the second contract must be regarded as supplemental to the option and that, therefore, no consideration was shown for the defendant's promise to purchase the shares, the theory being, that the promise of the defendant was one to perform an existing contract obligation on his part.<sup>1</sup>

An assignment of an interest in an option for the purchase of land is a valid consideration for a promissory note.<sup>2</sup>

SEC. 319. OTHER CONTRACT AS CONSIDERATION FOR OPTION.—By written agreement, plaintiff agreed to relieve defendant from the necessity of furnishing security on notes given for land sold at public auction under a court decree, and defendant agreed to give plaintiff the privilege of buying the land from him at a specified price and within a specified time if he should elect so to do, and it was held the option privilege was not void as being without consideration, as the assent of plaintiff to confirmation of the sale to defendant, without sureties on his purchase notes, was a valuable consideration. In other words,

<sup>1</sup> *Wescott v. Mitchell*, 95 Me. 377, 50 Atl. 21.

See *Pattillo v. Jones*, 113 Ga. 330, 38 S. E. 745, pledging option as consideration for another contract.

<sup>2</sup> *Hanna v. Ingram*, 93 Ala. 482, 9 So. 621.

there was a surrender of a legal right by plaintiff and a corresponding real benefit to the defendant.<sup>1</sup>

An agreement giving the owner of cows the use of \$1000 theretofore deposited with him by plaintiff, is a sufficient consideration for an option to purchase the cows given by defendant to plaintiff.<sup>2</sup>

So, also, is an agreement by the optionee to bear a share of the expense of farming the optioned land during the time limit of the option.<sup>3</sup>

An agreement to sell is sufficient consideration to support a promise to pay an agreed price for an option to purchase a mining claim.<sup>4</sup>

The grant of a franchise by a municipal corporation is consideration for an option therein reserved for additional electric power for municipal purposes.<sup>5</sup>

**SEC. 320. OTHER CONTRACT NOT CONSIDERATION FOR OPTION.**—On the other hand, an agreement by an agent authorized to sell land that he will endeavor to sell it at a fixed net

<sup>1</sup> *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195.

Also *McKeen v. Harwood*, 15 Ala. 792, holding waiver of option to rent building is consideration for option; *Great Western Oil Co. v. Carpenter*, 43 Tex. Civ. App. 229, 95 S. W. 57, holding release of prior oil and gas lease is consideration for second lease.

*Moore v. Detroit L. Works*, 14 Mich. 266, holding option to deliver, or not to deliver, engine is consideration to support agreement to discharge contract.

<sup>2</sup> *Western U. T. Co. v. Williams*, 57 Tex. Civ. App. 267, 137 S. W. 148; also *Donahue v. Potter & George Co.*, 63 Neb. 128, 88 N. W. 171.

<sup>3</sup> *Stein v. Leeman*, 161 Cal. 502, 119 P. 663.

<sup>4</sup> *Morris v. Lagerfelt*, 103 Ala. 608, 15 So. 895.

<sup>5</sup> *City of Colorado Springs v. Pikes Peak Hydro-Electric Co.*, 67 Colo. 169, 140 P. 921.

price to the owner, is not sufficient consideration for the granting of an option to the agent to purchase the land, at that price, within a certain time, as the contract is a mere proposal to sell and revocable by the owner at any time before the land is sold, or the exercise, by the agent, of his option to purchase.<sup>1</sup> So, with reference to a void oral agreement by the terms of which the optionee agrees to go out and create a market for the optioned land.<sup>2</sup>

An agreement of sale and purchase of a certain lot on which is endorsed, or written, an option to purchase an adjacent lot, is not a consideration for the latter.<sup>3</sup>

SEC. 321. LEASES.—The rule is that the consideration to support the option contract must be separate and apart from the consideration to support the agreement of sale,<sup>1</sup> but in many contracts, like leases, the legal presumption is that the rental was fixed or agreed upon with a view of the exercise of the option privilege, thus furnishing a consideration for the option contract.<sup>2</sup>

<sup>1</sup> Jolliffe v. Steele, 9 Cal. App. 212, 98 P. 544, the real ground in this case is that the agreement to sell being personal, could not be enforced against the agent; see Smith v. Cauthen, 98 Miss. 746, 54 So. 844; Kolb v. Bennett L. Co., 74 Miss. 567, 21 So. 233.

<sup>2</sup> Reigart v. Coal & Coke Co., 217 Mo. 142, 117 S. W. 61.

<sup>3</sup> Davis v. Shaw, 21 Ont. L. Rep. 474, 15 Ont. Wkly. Rep. 134, 16 Ont. Wkly. Rep. 273.

<sup>1</sup> Williams v. Graves, 7 Tex. Civ. App. 356, 26 S. W. 334; Ide v. Leiser, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; Stigler v. Jaap, 83 Miss. 351, 35 So. 948; Crystal Lake Cemetery Ass'n v. Farnham, 129 Minn. 1, 151 N. W. 418.

<sup>2</sup> Hunter, Matter of, (N. Y.) 1 Edw. Ch. 1; Heyward v. Willmarth, 84 N. Y. S. 75, 87 App. Div. 125, also on adjoining land.

Leases containing options to purchase furnish the largest class of contracts under consideration, but the same principle runs through all classes. If the option forms part of a lease, the consideration for the lease furnishes the consideration for the option.<sup>3</sup>

As aptly said by the Supreme Court of Appeals, of Virginia, in one of the leading cases on this subject,<sup>4</sup> "A man may be willing to take a lease with the privilege of the purchase of the property or a renewal of the lease, but unwilling to accept it in

<sup>3</sup> *Monihon v. Wakelin*, 6 Ariz. 225, 56 P. 735, renewal; *Cates v. McNeil*, (Cal.) 147 P. 944; *Swanston v. Clark*, 153 Cal. 300, 95 P. 1117; *Williams v. Eldora etc. M. Co.*, 35 Colo. 127, 83 P. 780; *Walker v. Edmundson*, 111 Ga. 454, 36 S. E. 800; *Stanwood v. Kuhn*, 132 Ill. App. 466; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Globe Brewing Co. v. Simon*, 132 Ill. App. 198, voluntary offer to renew not acted upon; *O'Connor v. Harrison*, 132 Ill. App. 264; *Souffrain v. McDonald*, 27 Ind. 269; *Wolf v. Lodge*, 159 Iowa 162, 140 N. W. 429; *Overall v. Madisonville*, 125 Ky. 684, 31 Ky. L. Rep. 278, 102 S. W. 278, 12 L. R. A. (N. S.) 433; *Murphy v. Hussey*, 117 La. 390, 41 So. 692; *Amiss v. Whitting*, 121 La. 501, 46 So. 606; *Gustin v. School District*, 94 Mich. 502, 54 N. W. 156, 34 A. S. R. 361; *Wright v. Kaynor*, 150 Mich. 7, 113 N. W. 779; *Murphy v. Anderson*, 128 Minn. 106, 150 N. W. 387; *Elliott v. DeLaney*, 217 Mo. 14, 116 S. W. 494; *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871; *Dengler v. Fowler*, 94 Neb. 621, 143 N. W. 944; *Harper v. Ruerner*, 85 Neb. 343, 123 N. W. 313; *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Waters v. Bew*, 52 N. J. Eq. 787, 29 Atl. 590; *White v. Weaver*, 68 N. J. Eq. 644, 61 Atl. 25; *Feudtner v. Ross*, 74 N. J. Eq. 214, 69 Atl. 190; *Bullock v. Cutting*, 140 N. Y. S. 686; *Pearson v. Millard*, 150 N. C. 303, 63 S. E. 1053; *Schroeder v. Gemeinder*, 10 Nev. 355; *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426, working mine, proceeds to optionor; *House v. Jackson*, 24 Ore. 89, 32 P. 1027; *Tilton v. Sterling C. Co.*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689; *Richardson v. Harkness*, 59 Wash. 474, 110 P. 9; *Brink v. Mitchell*, 135 Wis. 416, 116 N. W. 16, rent to be applied on price; *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972; *Federal Oil Co. v. Western Oil Co.*, 112 Fed. 373.

<sup>4</sup> *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150.

any other way. The option of purchase inserted in the lease is the inducement to the contract on both sides. Without it the owner is unable to procure a contract of lease, and but for it the lessee would not take the property. His purpose may be to build up a mercantile or other kind of business, with a view to permanent location if he succeeds, and with the intention to purchase if he does succeed, and the wish to be free to abandon the property at the end of his term if his experiment should prove to be unsuccessful. It is a partially executed contract so far as he is concerned, for by taking the lease he has paid for that right of purchase, and, having secured it, may exercise it or abandon it at his pleasure."

SEC. 322. DEPOSIT AND PART PAYMENT OF PRICE.—The option contract, as we have seen, is separate and distinct from the agreement of sale and purchase. The option contract, therefore, must have a consideration to support it independently of the price to be paid for the land under the agreement of sale, but it does not follow that because money paid by the optionee at the time of the execution of the option contract is to be applied on the price, such payment does not furnish consideration for the option contract. The application or credit of such payment on account of the price is a secondary matter. The question is whether, in the first instance, the money was paid as consideration for the option contract.<sup>1</sup>

<sup>1</sup> *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17.

Therefore, a stipulation to pay interest on the price is not a consideration to support the option, *Moise v. Company*, 79 Neb. 124, 112 N. W. 372.

Thus, the optionee agreed to pay \$1000 to the optionor at the expiration of one year, for the privilege of purchasing a distillery at the price of \$5000, provided he did not purchase, and if he did, then the \$1000, by the terms of the option, were to be applied on the purchase price of the distillery, and it was held there was consideration for the option.<sup>2</sup>

Defendant, in consideration of \$2000 paid, gave plaintiff an option to purchase certain land and it was stipulated that if defendant did not, before the expiration of the option time limit, make a certain payment on account of the price, the agreement should be void and plaintiff should retain the \$2000. The \$2000 was a part of a \$20,000 payment required by the terms of the option. It was held there was consideration for the option.<sup>3</sup>

Where, by the terms of an option, the money paid down was to be forfeited to the optionor in case the optionee failed to complete the purchase in accordance with the terms of the option, the money so paid furnishes a consideration for the option.<sup>4</sup> So where, under an option to purchase fixtures, the optionee deposited a certain sum which, by the terms of the option, was to be paid

<sup>2</sup> *Grabenhorst v. Nicodemus*, 42 Md. 236.

<sup>3</sup> *Kingsley v. Kressly*, 60 Ore. 167, 118 P. 678, Anno. cases 1913E, 746, the Court saying: "It is true the \$2000 was to constitute part of the purchase price if the sale was completed but the same was plaintiff's (optionor's) money in either case," that is, whether or not plaintiff elected.

<sup>4</sup> *Woodward v. Davidson*, 150 Fed. 840, reversed on other grounds, 156 Fed. 915.

to the owner if the optionee did not purchase.<sup>5</sup> So, also, where there was an option reciting the receipt of \$10 as a deposit and providing for the payment of the balance of \$560 on delivery of the deed, although there was no express stipulation forfeiting the deposit to the optionor in the event of the failure of the optionee to elect.<sup>6</sup>

### SEC. 323. SAME. CONTINUED. THE TEST.

—The test is whether the money paid is the property of the optionor irrespective of an election by the optionee.<sup>1</sup> Consequently, if the option provides that upon failure of the optionee to elect, the moneys paid shall be returned to the optionee, then clearly the option is without consideration.

Thus, under an option acknowledging the receipt of \$300 on account of the purchase price of \$10,000 for certain land, and providing that the optionor should furnish an abstract of title and warranty deed conveying a marketable title satisfactory to the attorney of the optionee, and if not satisfactory, the optionor should return the \$300 payment, the

<sup>5</sup> Nagel v. Cohn, 112 N. Y. S. 1066, the owner also deposited a like amount to be paid to the optionee in the event of the owner's failure to sell.

<sup>6</sup> Copple v. Aigeltinger, 167 Cal. 706, 140 P. 1073, not following Leuschner v. Duff, 7 Cal. App. 721, 95 P. 914.

In *Estes v. Furlong*, 59 Ill. 298, it was held that payment made at the date of the option should be regarded as payment on the price and also as a consideration for the option.

In *Taylor v. Newton*, 152 Ala. 459, 44 So. 583, it was held a subsequent part payment on the price furnished consideration for the option.

<sup>1</sup> *Kingsley v. Kressly*, 60 Ore. 167, 118 P. 678, Anno. cases 1913E, 746; *Leuschner v. Duff*, 7 Cal. App. 721, 95 P. 914, not followed in *Copple v. Aigeltinger*, 167 Cal. 706, 140 P. 1073.

payment does not constitute a consideration for the option.<sup>2</sup>

SEC. 324. ADEQUACY.—At law, in the absence of fraud or mistake, the slightest consideration is sufficient to support the most onerous contract obligation.<sup>1</sup> In other words, adequacy of consideration is, as a rule, immaterial. Courts of equity follow the rule of law, but view inadequacy of consideration as a circumstance indicating fraud, or as characterizing the transaction as unfair, in which cases, specific performance will not be granted if the inadequacy be so gross as to be evidence of fraud.

<sup>2</sup> *Friendly v. Elwert*, 57 Ore. 599, 112 P. 1085, s. c. 105 P. 404; also *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485.

The text is based on the Oregon case cited, but it would seem the rule should be limited to cases where, by the terms of the option, the optionee may arbitrarily reject the title. If the optionee may not reject the title except upon some ground sufficient in law, that is, on the ground that the title is not marketable within the rule, it is not apparent why deposit or payment on the price, in such case, is not a consideration, even though it is to be returned to the optionee in the event the title is found unmarketable. See *Simmons v. Zimmerman*, 144 Cal. 256, 79 P. 451, 1 Ann. Cas. 850.

<sup>1</sup> *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228; *Lawrence v. McCalmont*, 43 U. S. 426, 11 L. Ed. 326.

*Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150, 153, noting as an exception an exchange of money.

*Price v. Jones*, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230, when of indeterminate value, court will not substitute its judgment for that of contracting parties.

*Blake v. Blake*, 7 Iowa 46, if *bona fide*, no matter how slight or insignificant, it is sufficient; but where inadequacy of consideration is so gross as to create a presumption of fraud, the contract founded thereon will not be enforced, but, in such case, it is the fraud and not the inadequacy which invalidates the contract; also, *Rice v. Gibbs*, 33 Neb. 460, 50 N. W. 436; see *Kennedy v. Shaw*, 43 Mich. 359, 5 N. W. 396; *Caplice v. Kelley*, 27 Kan. 359.

The contract must not, of course, be unconscionable; a consideration of one cent will not support a promise to pay \$600, *Schnell v. Nell*, 17 Ind. 29, 7 Am. Rep. 453; *Hubbard v. Coolridge*, 42 Mass. 84.



In considering adequacy of consideration to support an option contract it is necessary to keep in mind that in every suit for specific performance growing out of an option contract, there are, in fact, two separate and distinct contracts, namely, the option contract, and the agreement to sell, resulting from the election of the optionee to purchase.<sup>2</sup> The considerations for the two contracts are as separate and distinct as the contracts themselves.<sup>3</sup>

With reference to the agreement to sell, where it is sought to have it specifically enforced, the consideration must be adequate in accordance with the equitable rule on that subject. In other words, the sufficiency of the consideration to support an option contract is tested by the rule at law, while the adequacy of the consideration for the agreement to sell is determined in accordance with well established rules of equity.<sup>4</sup>

<sup>2</sup> *Walter G. Reese Co. v. House*, 162 Cal. 740, 124 P. 442; *Murphy T. & Co. v. Reid*, 125 Ky. 585, 101 S. W. 964, 31 Ky. L. Rep. 176, 10 L. R. A. (N. S.) 195; *Stearnes v. Goad*, 111 Va. 834, 69 S. E. 1101.

<sup>3</sup> *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; *Rease v. Kittle*, *supra*.

<sup>4</sup> See *Heyward v. Bradley*, 179 Fed. 325, 102 C. C. A. 509, holding the court, in its discretion, would not be authorized to deny specific performance because performance of the contract, independent of fraud, would result in hardship to the defendant, there being no circumstance other than alleged inadequacy of consideration as constituting such hardship. The consideration for the phosphate mine was \$20,000 which, after exploration, showed the deposit to be worth \$70,000; see also *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602.

The rule on the subject is summarized in *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150, 153, thus: "Inadequacy of consideration is no ground for refusing to enforce a contract specifically unless it is so gross as to amount to conclusive, or at least satisfactory evidence of fraud, or unless accompanied by other circumstances going to show fraud." See *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535, 537; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101.

SEC. 325. **NOMINAL SUM OF MONEY. GENERALLY.**—It is established by the great weight of judicial authority that a nominal sum of money is a sufficient consideration for an option contract, meaning thereby that an option contract supported by a nominal money consideration is not revocable by the optionor during its time limit.

The rule is without qualification as a matter of strict law but it needs explanation in view of the fact that there are a few decisions, some apparently, others really, which either hold to the contrary, or, in particular cases, base their decisions upon this fact when the record before them, apart from the nominal consideration, showed there were overruling equitable defenses, or legal grounds, which, in themselves, would have prevented a court of equity from decreeing specific enforcement of the contract at the suit of the optionee.<sup>1</sup>

From this statement it is not to be inferred that the smallness of the money consideration is a circumstance which a court of equity may not take into consideration, with other proper matters and defenses, in determining the right to have specific performance. Undoubtedly, the court has such right and certainly it is its duty fully and carefully to consider every fact and circumstance in the case.

<sup>1</sup> It must not be inferred we are taking the position that an option supported by a nominal or any other kind or character of consideration, entitles the optionee to specific performance as a matter of course. The rule we are discussing is one to the effect that a nominal sum of money paid for an option contract renders the contract irrevocable during its time limit. What is said concerning specific performance is by way of application of the rule, for it is also true that an option contract may have a consideration to support it meeting all the requirements of the law and still be one which, upon equitable grounds, a court of equity would not specifically enforce.

But as we view it, a nominal money consideration is a circumstance merely and only. A defense based upon such circumstance as the only evidence of fraud, or unfair dealing, or hardship, must fail. In such cases a court of equity, in accordance with its own established rule, must follow the law on the subject.<sup>2</sup>

The subject is confused to a certain extent by the rule applicable to the recital, in the option contract, of a money consideration, or the acknowledgment of receipt of a money consideration, or by the fact that the option contract is under seal. Again, in considering oil leases and mineral licenses and like contracts containing options to purchase, which give possession to the lessee, permit development work and provide for payment of rents, or royalties, and oftentimes commute development work upon payment of a certain amount, the overruling equities frequently growing out of such contracts, as well as, now and then, the speculative character of a particular transaction, tend strongly to induce courts to decline to grant specific enforcement, notwithstanding the presence of a nominal money consideration.

In the next following sections, having first cited the decisions to sustain the rule announced in this section, we shall present other decisions, touching the matters to which reference has been made.

**SEC. 326. DECISIONS HOLDING NOMINAL SUM OF MONEY SUFFICIENT.**—A consideration of fifty cents is sufficient to support an option

<sup>2</sup> *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101; see next preceding section.

contract, and if the optionee accepts within the time limit the contract will be specifically enforced,<sup>1</sup> and so, also, are twenty-five cents;<sup>2</sup> one dollar;<sup>3</sup> five dollars;<sup>4</sup> twenty-five dollars;<sup>5</sup> fifty dollars;<sup>6</sup> one hundred dollars.<sup>7</sup> One dollar is a consideration for an option on fifty acres of land at \$47.50 per acre,<sup>8</sup> and is likewise a consideration for an option on two hundred thirty-three acres of land at \$15 per acre.<sup>9</sup> So, also, \$1 paid at the execution of the contract for an oil and gas privilege is a sufficient consideration to support the contract in its entirety.<sup>10</sup>

<sup>1</sup> *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 30 A. S. R. 47, 11 L. R. A. 148, holding that a valuable consideration whether adequate or not is sufficient to prevent withdrawal for the fixed time.

<sup>2</sup> *Marsh v. Lott*, 8 Cal. App. 384, 97 P. 163.

<sup>3</sup> *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580, "As the parties agree to sell an option to buy for the sum of \$1 there is no reason why such an expression of consideration is not an adequate one."

<sup>4</sup> *Rice v. Gibbs*, 33 Neb. 460, 50 N. W. 436; *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 A. S. R. 977, 2 Ann. Cas. 421; *Sims v. Lide*, 94 Ga. 553, 21 S. E. 220.

<sup>5</sup> *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997.

<sup>6</sup> *Aiple-Hammelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652; *Johnston v. Trippe*, 33 Fed. 530.

<sup>7</sup> *Wright v. Suydam*, 72 Wash. 587, 131 P. 239.

<sup>8</sup> *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881, 1 Ann. Cas. 986.

<sup>9</sup> *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645, under seal.

<sup>10</sup> *Pittsburg etc. Co. v. Bailey*, 76 Kan. 42, 90 P. 803; see *Federal Oil Co. v. Western Oil Co.*, 112 Fed. 373; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101.

SEC. 327. DECISIONS HOLDING NOMINAL SUM OF MONEY INSUFFICIENT.—In a Colorado case a sealed option to purchase land recited a consideration of one dollar, which, in fact, was not paid or agreed to be paid. The Court in denying the specific enforcement of the contract at the suit of the optionee on the ground that the election to purchase was conditional or insufficient, remarked that the recital of consideration was a matter of form, but that, if the consideration had been actually paid, it would be nominal merely and would not constitute a proper or fair consideration, usually considered essential to a suit for specific performance.<sup>1</sup> It is very evident the Court erroneously applied to the option contract the rule applicable to the consideration necessary to support the agreement of sale and purchase.

In line with the foregoing decision, is one from the Kansas City Court of Appeals where it was held the remission of a notary's fee of \$3 due the optionee from the optionor, was not sufficient to support an option to a broker to sell the land. On rehearing the same Court remarked that, in accordance with the authorities, any appreciable consideration was sufficient to support the contract there in question, and referring to the case in hand, said the alleged consideration was a mere pretext and

<sup>1</sup> *Rude v. Levy*, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 91, 127 A. S. R. 123.

*Axe v. Tolbert*, 179 Mich. 556, 146 N. W. 418, cites and follows *Rude v. Levy*, *supra*. In the latter case the writing recited the receipt of a "valuable consideration," but no consideration was actually paid and the Court very properly held that the time and money spent by the optionee in trying to sell the property could not be considered as a "substantial consideration." See Sec. 313.

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was not deemed of sufficient importance by the parties to be inserted in the writing, and then affirmed the former decision denying specific performance on the ground of uncertainty in the terms of the contract.<sup>2</sup>

The Court of Appeal in Kentucky,<sup>3</sup> referring to an option to purchase land, reciting a consideration of \$1 therefor, held, that, while there are authorities holding a consideration of \$1 is sufficient to uphold an option, it is not disposed to go that far, saying that such consideration is so flagrantly disproportionate to the value of the privilege in the case before it—the option running for a year—that it was merely nominal and not substantial. In this case the optionee timely and properly elected and, on that ground, the judgment of the lower court sustaining a demurrer to the petition of the optionee for specific performance, was directed to be overruled.

### SEC. 328. NOMINAL SUM AS CONSIDERATION. OIL AND GAS LEASES AND LICENSES.<sup>1</sup>—The owner granted a corporation,

<sup>2</sup> Wallace v. Figone, 107 Mo. App. 362, 81 S. W. 492.

<sup>3</sup> Murphy T. & Co. v. Reid, 125 Ky. 585, 101 S. W. 964, 31 Ky. L. Rep. 176, 10 L. R. A. (N. S.) 195; also Stamper v. Combs, (Ky.) 176 S. W. 178.

<sup>1</sup> It should be noted these so called oil and gas leases are not always strictly "leases" as defined and treated, in the law of landlord and tenant. They are oftentimes in the nature of a written license with a grant conveying the grantor's interest in the gas or oil well, conditioned that gas or oil be produced in paying quantities, Dickey v. Coffeyville etc. Co., 69 Kan. 106, 76 P. 398; or depending on their terms, mere options, Risch v. Burch, 175 Ind. 621, 95 N. E. 123, or leases, Barnsdall v. Bradford Gas Co., 225 Pa. 338, 74 Atl. 207; Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62.

in consideration of \$1, and certain stipulations on its part, the privilege of entry on the land, for the term of 10 years, to bore gas and oil wells, and in the event of discovering oil or gas in paying quantities, agreed to convey the title to the products for a specified royalty. The corporation agreed to complete a well within two years or to pay a rental of 25 cents per acre until a well was completed on the premises. There was a provision for extension of the term so long as oil or gas was produced in paying quantities and the rental was paid, and also giving the corporation the right to surrender the contract at any time and be discharged from all liability for non-fulfillment, and it was held that the amount paid at the execution of the contract and the commutation rental, subsequently paid, furnished a consideration to support the contract.<sup>2</sup>

In another case, similar to the above, the lease contained a forfeiture clause providing that, if no well was completed within two years from date, the lease or grant should become null and void as to both parties, but giving the lessee the right to prevent such forfeiture, from year to year, by paying annually, in advance, a certain small sum until the well was completed. The Court held the effect of this clause was to make the grant a lease from year to year at the option of the lessee until oil or gas was produced; that while \$1, the recited considera-

<sup>2</sup> *Pittsburg etc. Co. v. Bailey*, 76 Kan. 42, 90 P. 803, citing *Allegheny Oil Co. v. Snyder*, 106 Fed. 764, 45 C. C. A. 604, involving a similar lease and holding that the recited consideration of \$1.00 supported not only the leasehold term but also the privilege of extending the term for drilling by paying the stipulated price therefor. In the Kansas case there was no suggestion of fraud or bad faith; also *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46.

tion, was small, yet it was valuable, saying the Court could not say it was inadequate, under the circumstances, as the lessor did not so consider it. There was no fraud charged, and the Court said that, in such case, inadequacy of consideration alone is not sufficient to invalidate the lease.<sup>3</sup>

SEC. 329. NOMINAL SUM AS CONSIDERATION. OIL AND GAS LEASES AND LICENSES, CONTINUED.—In a Louisiana case, the oil lease recited a consideration of \$1 as paid, but the lessee actually paid \$50 in cash to the lessor as consideration at the time of its execution. The lease was for a term of 10 years, and for the sole purpose of operating for oil and gas on 40 acres of land owned by the lessor, lying in a field where no oil had been produced, but in close proximity to property having oil indications. The lessee agreed to begin operations within six months, or to pay \$50 quarterly, in advance, for each three months of delay, and to deliver to the lessor one-eighth royalty. The lease provided that the lessee might, at any time, surrender and cancel the lease on payment of \$100. Three commutation payments were made. The tender of the fourth payment was made four days after the date stipulated, and was refused on the ground that the contract, because of the delay, had been forfeited. Thereafter, but before any steps were taken to enforce the forfeiture,

<sup>3</sup> *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101, citing *McMillan v. Phil. Co.*, 159 Pa. 142, 28 Atl. 220, and *Allegheny Oil Co. v. Snyder*, *supra*; see *South Penn. Oil Co. v. Snodgrass*, 71 W. Va. 438, 76 S. E. 961, 43 L. R. A. (N. S.) 848.



plaintiff, the transferee of the lessee, began drilling a well on the property, whereupon he was enjoined, and later brought a suit to enforce his rights under the contract, to which the defendant, claiming under the owner and lessor of the land, answered, and set up the defenses that the contract was forfeited by non-performance, that it was obtained by fraud, etc., and that the consideration was inadequate.

On the original hearing, it was held that, in the absence of any allegation connecting plaintiff with the alleged fraud, the testimony offered in support of this defense was properly excluded; that the law does not favor forfeitures, and that, consequently, the contract did not *ipso facto* become forfeited by reason of the failure of the lessee to drill or to pay on the day stipulated; and that the consideration for the contract was adequate.

On rehearing it was held, among other things, that, since the sole object and purpose of the contract was to explore the land for oil and gas, and the contract, by its terms, left the lessee at liberty to do so or not, at his option, there was in reality no contract binding on the lessee. The Court said the real and only consideration for the contract, on the part of the lessee, was the obligation to develop, and that an oil development lease which left the lessee free not to develop or to make certain periodical payments, is held by the courts to be void for want of mutuality of obligation, and, further, that the attempt to meet and circumvent this principle of the decisions by stipulating for and paying

as a consideration, a paltry sum of one or two dollars, had been made in vain.<sup>1</sup>

SEC. 330. NOMINAL SUM AS CONSIDERATION. OIL AND GAS LEASES AND LICENSES, CONTINUED.—A lease for a consideration of \$1 for the purpose of drilling and operating for oil and gas which does not obligate the lessee to commence or prosecute such operations, and which he may terminate at his pleasure without compensation to the lessor, is unconscionable, and will not be enforced where the only consideration is prospective royalties, and, where the lessee fails, for eight months, to commence development, the agreement is without consideration.<sup>1</sup>

SEC. 331. RECITAL OF CONSIDERATION.—The general rule on this subject is that a mere recital of consideration in a contract not under seal is not conclusive, and that parol evidence is admis-

<sup>1</sup> *Jennings-Heywood Oil Synd. v. Houssiere-Latreille Oil Co.*, 119 La. 793, 44 So. 481, 496, two judges dissenting, two concurring in the judgment and one concurring in a separate opinion, on the ground that, as the lessee had the option to commence boring or pay in advance, the contract was breached by him for failure to tender the fourth quarterly commutation advance at the stipulated time, and the concurrence of the majority would seem to indicate the decision turned on this point; see *Murray v. Barnhart*, 117 La. 1023, 42 So. 489.

<sup>1</sup> *Federal Oil Co. v. Western Oil Co.*, 112 Fed. 373, the Court saying: "The consideration would be so trifling compared with the value of the leasehold estate as to shock the moral sense."

See also *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558, 27 Ky. L. Rep. 724, holding a recited consideration of \$1.00 insufficient on similar facts; see also *Litz v. Goosling*, 93 Ky. 185, 19 S. W. 527, 21 L. R. A. 127, 14 Ky. L. Rep. 91; *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955; *Moffat Coal Co. v. Miller*, 173 Ill. App. 408.

sible either to show want of any consideration or what the real consideration is. And this rule also obtains with reference to recital of payment or receipt of consideration, with the qualification, speaking generally, that the recital, when one of the essential terms of the contract, may not be contradicted for the purpose of defeating its operation.<sup>1</sup>

In accordance with the rule, the real consideration may be shown notwithstanding recital of a nominal consideration. Thus, in an option upon a mine, reciting a nominal consideration of \$1, evidence was admitted to show, as the real consideration, an expenditure of some \$26,000 in developing the mine,<sup>2</sup> and it is also admissible to show want of any consideration for the option, or fraud, or

<sup>1</sup> *Wellmaker v. Wheatley*, 123 Ga. 201, 51 S. E. 436, evidence not admissible to show that consideration expressed applied only to the lease and not to the lease and option; see *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 115 A. S. R. 880, 5 L. R. A. (N. S.) 1194; *Fuller v. Artman*, 69 Hun. 546, 2 N. Y. S. 13, 53 N. Y. St. Rep. 339, also under seal.

When an essential term, *Pickett v. Green*, 120 Ind. 584, 22 N. E. 737. The acknowledgment, in an oil and gas lease, of payment of a specified consideration, can not be contradicted for the purpose of impairing its legal effect as a conveyance, or of invalidating the instrument, *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46, action to annul lease.

As to effect of recital, see *National Oil etc. Co. v. Teel*, 95 Tex. 586, 68 S. W. 979.

In *Watkins v. Robertson*, *supra*, it is said the English rule is that the recital of a valuable consideration in a deed is conclusive; that in the United States it is open to question or explanation for many purposes but not for these two: (a) To defeat the deed, or (b) to raise a resulting trust in the grantor.

If the consideration for the option is not expressed it may be proved at the trial. *Benedict v. Pincus*, 191 N. Y. 377, 84 N. E. 284.

<sup>2</sup> *Waterman v. Waterman*, 27 Fed. 827; *Murphy T. & Co. v. Reid*, 125 Ky. 585, 101 S. W. 964, 10 L. R. A. (N. S.) 195, on demurrer.

illegality, notwithstanding the recital of a consideration in the contract.<sup>3</sup>

The recital of a consideration, however, is conclusive as against the optionor and in favor of a purchaser from the optionee for a substantial consideration, where the purchase was made with knowledge of the optionor and without his objection.<sup>4</sup> This qualification of the rule, however, is clearly based on estoppel.

The written option in many jurisdictions imports a consideration. The burden is on the party challenging it to prove want of consideration.<sup>5</sup> And where a written option recites a consideration of \$1 "to me paid" and the optionee testifies that that amount was actually paid to the optionor, his testimony, in addition to the written recital in the option, constitutes a preponderance of the evidence sufficient to sustain a finding that the consideration was paid as against the testimony of the optionor that the amount was not paid.<sup>6</sup>

<sup>3</sup> See *Stigler v. Jaap*, 83 Miss. 351, 35 So. 948, want of; *Crandall v. Willig*, 166 Ill. 233, 46 S. E. 755, this option was under seal but without any consideration; *Noble v. Mann*, 32 Ky. L. Rep. 30, 105 S. W. 152, want of; *Rude v. Levy*, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 91, 127 A. S. R. 123, want of; *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 588, 27 Ky. L. Rep. 724, oil lease; *McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612, fraud and illegality; *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 596.

<sup>4</sup> *Hoogendorn v. Daniel*, 178 Fed. 765, 102 C. C. A. 213, mine; see also *Fuller v. Artman*, 2 N. Y. S. 13, 69 Hun. 546, 53 N. Y. St. Rep. 339; *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 115 A. S. R. 880, 5 L. R. A. (N. S.) 1194; *Graybill v. Braugh*, 89 Va. 895, 17 S. E. 558, 37 A. S. R. 894, 21 L. R. A. 133.

<sup>5</sup> *Cone v. Cone*, 118 Iowa 458, 92 N. W. 665.

<sup>6</sup> *Jones v. Barnes*, 94 N. Y. S. 695, 105 App. Div. 287.

SEC. 332. SEAL. COMMON LAW.—At common law, one of the characteristics of a deed or contract under seal is that no consideration is necessary to support it. Consequently, at common law, a sealed option contract, though in fact without consideration, is valid in the sense that the offer continues binding on the optionor during the time limit,<sup>1</sup> and, except upon the ground of fraud or illegality, the consideration implied from the seal can not be impeached for the purpose of invalidating the option, or destroying its character as a specialty.<sup>2</sup>

Thus, defendant delivered to plaintiff a sealed offer to sell land conditioned on acceptance within ten days. There was no consideration for the offer except that imported by the seal. Two days after the offer, defendant withdrew it. Within ten days, plaintiff duly accepted the offer, and it was held the offer, being under seal, was an irrevocable covenant conditioned upon acceptance within ten days,

<sup>1</sup> *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 A. S. R. 880, overruling *Graybill v. Braugh*, 89 Va. 895, 17 S. E. 558, 37 A. S. R. 894, 21 L. R. A. 133; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Savereux v. Tourangeau*, 16 Ont. L. Rep. 600; *Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67.

*Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228. In this case the recited consideration of \$1 was not paid and the court seems to hold that the recital had the effect of a promise by optionee to pay it, thus furnishing a real consideration for the option, though its actual payment was delayed.

<sup>2</sup> *McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612, distinction between covenants and simple contracts pointed out.

*Weaver v. Burr*, *supra*; *Watkins v. Robertson*, *supra*; see *Hobbs v. Brush Electric Light Co.*, 75 Mich. 550, 42 N. W. 965; *Xenos v. Wickham*, L. R., 2 H. L. 296; *Sivell v. Hogan*, *supra*.

and that acceptance within that time made it a mutual contract, which plaintiff could enforce.<sup>3</sup>

It should be noted that courts of equity do not always follow the common law rule.<sup>4</sup> Courts of equity inquire into the consideration not for the purpose of setting aside the contract under seal,<sup>5</sup> but for the purpose of ascertaining whether they should lend their peculiar auxiliary remedy of specific performance to aid in its enforcement. And

<sup>3</sup> To the point that a sealed option contract imports consideration, see *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723.

*Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541; *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555, lease and option; *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645; *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *McCormick v. Stephany*, 57 N. J. Eq. 257, 41 Atl. 840, s. c. 61 N. J. Eq. 208, 48 Atl. 25, lease and option; *Johnston v. Wadsworth*, 24 Ore. 494, 34 P. 13, statute of frauds; *Barnes v. Hustead*, 219 Pa. 287, 68 Atl. 839; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Hanley v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *McMillan v. Ames*, *supra*; *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394; *Willard v. Tayloe*, 8 Wall. (U. S.) 557, 19 L. Ed. 501, lease and option; *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972, lease and option.

*Watkins v. Robertson*, *supra*, note 1, holds that a sealed option conclusively imports consideration, in suit for specific performance.

See Sec. 321, *supra*.

<sup>4</sup> *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755, evidence showed there was no consideration.

*Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874, acceptance not in time; in equity real consideration may be shown; option did not recite a consideration.

*Borel v. Mead*, 3 N. Mex. 84, 2 P. 222, real consideration may be shown.

<sup>5</sup> *Fuller v. Artman*, 69 Hun. 546, 2 N. Y. S. 13, 53 N. Y. St. Rep. 339, evidence that there was in fact no consideration not admissible for purpose of invalidating.

*Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972, not rebuttable to invalidate.

this rule, according to the decisions, applies to option contracts.<sup>6</sup>

SEC. 333. STATUTORY MODIFICATION OF RULE.—The common law rule with reference to sealed instruments has been abolished in some states, and, in others, the only effect now of the seal is to raise a presumption of consideration, a presumption,<sup>1</sup> however, which according to some decisions is also, under the statute, raised by written instruments not under seal.<sup>2</sup>

The effect of the statutory provisions abolishing the common law rule is not always made clear, but it is believed that, in those jurisdictions where the distinction between sealed and unsealed instruments has been abolished, a sealed option contract stands upon the same footing as an unsealed one,<sup>3</sup> and that such contracts are open to the same

<sup>6</sup> *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923, 929, on rehearing.

*McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612, fraud and illegality.

*Storch v. Duhnke*, 76 Minn. 521, 79 N. W. 533, holding it decides nothing contrary to the decision in *McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612. In the *Storch* case the option was contained in a sealed agreement of exchange. The case turned on the point that the agreement did not imply a consideration for the option. Following the rule of the *Storch* case is *Davis v. Shaw*, 21 Ont. L. Rep. 474, 15 Ont. Wkly. Rep. 134, 16 Wkly. R. 273.

The presence of a seal does not dispense with an acceptance of the sealed offer. *Penn Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. 22.

<sup>1</sup> *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485.

<sup>2</sup> *Vickery v. Maier*, 164 Cal. 384, 129 P. 273; see *Olston v. Company*, *infra* at page 1098 Reporter; *Cone v. Cone*, 118 Iowa, 458, 92 N. W. 665.

<sup>3</sup> *Tracy v. Alvord*, 118 Cal. 654, 50 P. 757.

inquiries, with reference to the consideration, as unsealed instruments.<sup>4</sup>

SEC. 334. EXTENSIONS.—An extension of an option contract differs in no important respect from the original option contract. We are concerned here, however, only with the consideration, and it is held that an agreement, not supported by a consideration, extending the time of election, is a nude pact and, like a mere offer, may be withdrawn by the optionor at any time before election by the optionee.<sup>1</sup> But an extension not supported by consideration, is still a continuing offer, and if accepted before withdrawal by the optionor, such act will raise the offer into a binding contract.<sup>2</sup>

<sup>4</sup> See *Olston v. Oregon Water Power and Ry. Co.*, 52 Ore. 343, 96 P. 1095, at page 1098, 20 L. R. A. (N. S.) 915; *Rude v. Levy*, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 91, 127 A. S. R. 123; *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485, *prima facie*; *McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612, *Axe v. Tolbert*, 179 Mich. 556, 146 N. W. 418.

In the *Olston* case, *supra*, from Oregon, it is stated that by statute the distinction between sealed and unsealed instruments has been abolished in Missouri, Kansas, Washington, and Nebraska. That in Alabama, New York, Michigan, Iowa, Indiana, New Hampshire, and Oregon a seal is *prima facie* evidence of a consideration. The latter rule obtains in California. *Tracy v. Alvord*, *supra*. The tendency of courts in common-law jurisdictions is to break away from the common-law rule. This is plainly exhibited by the decisions cited in the notes to the preceding sections.

<sup>1</sup> *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 A. S. R. 417; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881, 1 Ann. Cas. 986.

Where the extension is made after the expiration of the option time, a new consideration is necessary to support the extension. See *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853, 859.

<sup>2</sup> See *Ide v. Leiser*, *infra*, and *Coleman v. Applegarth*, *supra*; *Cummins v. Beavers*, *supra*; *Gira v. Harris*, *infra*.



The rule stated is the same whether the extension be oral or in writing,<sup>3</sup> with the qualification, however, that a written instrument, under the statute, imports a consideration therefor and casts the burden of disproving it upon the party attacking.<sup>4</sup>

An agreement to extend an option to purchase land is supported by the optionee's extension of the time for the settlement by the optionor of an account arising under the original option.<sup>5</sup>

<sup>3</sup> *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17, consideration for option does not support extension.

<sup>4</sup> *Gira v. Harris*, 14 S. D. 537, 86 N. W. 624.

<sup>5</sup> *Stein v. Leeman*, 161 Cal. 502, 119 P. 663, affirming 90 P. 536.

Promise to advance monthly installments of the price sufficient, *Scott v. Hubbard*, 67 Ore. 498, 136 P. 653.

Also to do assessment work, *Stamey v. Hemple*, 173 Fed. 61, 97 C. C. A. 379.

Mutual promises are sufficient, *Bourke v. Kissack*, 242 Ill. 233, 89 N. E. 990.

See *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830.



## CHAPTER IV.

### STATUTE OF FRAUDS.

- Sec. 401. Option contract for purchase of land.
- Sec. 402. Same. Cases.
- Sec. 403. Option contract for sale of goods, wares, and merchandise.
- Sec. 404. Agreement not to be performed within a year.
- Sec. 405. Contract or memorandum thereof. Scope of statute.
- Sec. 406. Contract or memorandum thereof. Essential terms of agreement must be in writing. Evidence.
- Sec. 407. Contract or memorandum thereof. Subscribing by party "to be charged." Agents.
- Sec. 408. Modification of terms. Generally.
- Sec. 409. Extension of option time.
- Sec. 410. Decisions holding parol extension invalid.
- Sec. 411. Decisions holding parol extension valid.
- Sec. 412. Extensions. Estoppel.
- Sec. 413. Extensions. Waiver.
- Sec. 414. Oral election or acceptance. Requirements of particular statutes.
- Sec. 415. Same. Oral election sufficient in most states.
- Sec. 416. Same. Mutuality.
- Sec. 417. Same. Rights of optionor under oral election.
- Sec. 418. Part and full performance.
- Sec. 419. Pleading.

SECTION 401. OPTION CONTRACT FOR PURCHASE OF LAND.—The statute varies more or less in the several states and, consequently, the statute of the particular state must be consulted to determine the validity of a contract falling within its provisions. It may, however, be said in a general way and as applicable to all states, that the statute of frauds applies to every executory contract for the sale and purchase of land, tenements, hereditaments, or any interest in or concerning the same.

An option contract prior to election does not, strictly speaking, convey or transfer any interest or estate in the land. It grants, as we shall see, a mere right of election to purchase.<sup>1</sup> The effect, however, of exercising the right of election is to bring into existence an agreement to sell, and this agreement to be enforceable must, of course, meet the requirements of the statute. It may be said, therefore, that an option contract giving the optionee the right to purchase land, tenements, hereditaments, or some interest in, or concerning the same, and turned into a bilateral contract by election, must be in writing and otherwise comply with the provisions of the statute of frauds, or, by force of the statute in some jurisdictions it is void, and in others unenforceable.<sup>2</sup> And when the statute

<sup>1</sup> See Sec. 501.

<sup>2</sup> Wall v. Minn. etc. Ry. Co., 86 Wis. 48, 56 N. W. 367; *Badenhop v. McCahill*, 42 How. Pr. (N. Y.) 192; *Hilberg v. Greer*, 172 Mich. 505, 138 N. W. 201; *Grover v. Buck*, 34 Mich. 519; *Esslinger v. Pascoe*, 129 Iowa 86, 105 N. W. 362, 3 L. R. A. (N. S.) 147, option on contract for purchase of land; *Reilly v. Steinhart*, 146 N. Y. S. 534, under Cuban Civil Code; *contra*, *Hughes v. Antill*, 23 Pa. Sup. Ct. 290.

permits a memorandum of the contract, the memorandum must contain all the essential terms of the contract.<sup>3</sup>

SEC. 402. SAME. CASES.—A verbal agreement by A to work for B for one-third of the profit of the business with an option of taking a one-third interest in B's farm in case A's share of the profits amounts to one-third of the cost of the farm, is, so far as concerns the conveyance, within the statute.<sup>1</sup>

An oral agreement by defendant to take a contract for the purchase of land on which plaintiff has paid a portion of the price, off his hands, at plaintiff's option, and to assume its conditions and be substituted in plaintiff's place, is a contract for the purchase of an interest in lands and within the statute.<sup>2</sup>

A parol agreement by owners employing a broker to procure a purchaser, made with the purchaser procured by the broker, to give the purchaser a specified time to decide whether he will accept the terms stated, is a contract for the sale of real estate and is within the statute.<sup>3</sup>

<sup>2</sup> Option for renewal of lease is within the statute, *Campbell v. Timmerman*, 139 Ill. App. 151.

<sup>3</sup> *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485, and also definitely show which party is seller and which buyer; *Walker v. Bamberger*, 17 Utah 239, 54 P. 108; *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434; *Hilberg v. Greer*, *supra*.

<sup>1</sup> *Friend v. Pentingill*, 116 Mass. 515.

<sup>2</sup> *Esslinger v. Pascoe*, 129 Iowa 86, 105 N. W. 362, 3 L. R. A. (N. S.) 147, invalid though exercised because of failure to comply with statute in its creation.

<sup>3</sup> *Granger Real Estate Ex. v. Anderson*, (Tex. Civ. App.) 145 S. W. 262.  
11—Option Contracts.

A promise in a lease that the owner may sell the premises on a certain notice to the lessee, and giving him the first opportunity to purchase the premises, provided he will pay as much as any other person, is not void under the statute of frauds as resting partly in parol.<sup>4</sup> But a parol contract between the owner of land and his tenant to give the latter the privilege of buying the land is within the statute.<sup>5</sup>

A contract giving one an interest in the net profits to be realized from the sale of an option on certain coal and oil lands, does not give him such interest in the land as to be within the statute.<sup>6</sup>

The statute does not apply to executed contracts, as where a deed has been executed. In such case, the optionor may recover the price although the option fails to meet the requirements of the statute.<sup>7</sup>

An option to repurchase land must be in writing,<sup>8</sup> but an oral surrender by the optionee in possession

<sup>4</sup> *Marske v. Willard*, 169 Ill. 276, 48 N. E. 290, affirmed 68 Ill. App. 83.

<sup>5</sup> *Green v. Hammock*, 13 Ky. L. Rep. 145, 16 S. W. 357; *Campbell v. Timmerman*, 139 Ill. App. 151, option to renew lease; see *Remm v. Landon*, 43 Ind. App. 91, 86 N. E. 973, option to extend lease.

<sup>6</sup> *Keller v. Fitzgerrell*, 249 Ill. 451, 94 N. E. 926.

Agreement between optionee in possession to divide commission with optionor is within Sub. 6, Sec. 1624, California Civil Code, requiring contracts for the payment of commission for the sale of real estate to be in writing, *Crowell v. Ewing*, 4 Cal. App. 358, 88 P. 285. See, however, *Pierson v. Donham*, (Ind. App.) 104 N. E. 606, holding an oral commission agreement to obtain an option for purchase of land is not within statute.

<sup>7</sup> *Landon v. Morehead*, 34 Okl. 701, 126 P. 1027, also holding action by assignor to recover price for which option was sold is not affected by statute of frauds, the assignment being executed and the consideration remaining unpaid.

<sup>8</sup> *Getman v. Getman*, 1 Barb. Ch. (N. Y.) 499; *Holt v. Moore*, 37 Ark. 145; *Thompson v. Elliott*, 28 Ind. 55; *Graves v. Graves*, 45 N. H. 323.

where there has not been an election, is not within the statute.<sup>9</sup> The fact that the oral promise was in the alternative giving the promisor his election to convey the land, or pay a certain sum of money, does not except it from the statute.<sup>10</sup>

### SEC. 403. OPTION CONTRACT FOR SALE OF GOODS, WARES AND MERCHANDISE.—

The statute of frauds also applies to contracts for the sale of goods, wares, and merchandise, and also, in many jurisdictions, to choses in action or things in action, and chattels generally, in excess of a certain price, unless there is an acceptance, or part acceptance, of the goods, or part payment of the purchase price. An option contract giving the right of election to purchase any of the articles of personal property enumerated in the statute, and

<sup>8</sup> In *Burrell v. Root*, 40 N. Y. 496, R conveyed certain land to B and, at the same time, executed an agreement under seal signed by him alone, by which he agreed that at the expiration of four years, the land would be worth \$6 per acre and that he would then purchase it back from B at that price, if B should desire to sell. B, by letter, accepted the terms of the offer and at expiration of time tendered his deed of conveyance of the land, and brought action against R to recover the price, and it was held the contract was valid and binding on R and that the action would lie; that the contract was not for a sale of land and not, therefore, within the statute of frauds, providing that every contract for the sale of lands, etc., shall be void unless the contract, etc., shall be in writing, and "subscribed by the party by whom the sale is made," the Court holding that the quoted clause of the statute applied only to contracts where some obligation is assumed by the owner as the party making the sale, and, consequently, it did not apply to B, who had a mere option right.

<sup>9</sup> *Adams v. Fullam*, 43 Vt. 592.

Oral surrender of option within Wisconsin statute, *Telford v. Frost*, 76 Wis. 172, 44 N. W. 835, but not invalid under Colorado statute, *Larsh v. Boyle*, 36 Colo. 18, 86 P. 1000.

<sup>10</sup> *Patterson v. Cunningham*, 12 Me. 506.

at a price in excess of that specified is a "thing in action" after election and, therefore, falls within the provisions of this clause of the statute of frauds.<sup>1</sup> The statute, however, does not apply to an agreement to procure an option to further develop a mine and subsequently to form a corporation and issue stock which is to be equally divided among the partners in the joint adventure.<sup>2</sup>

A contract for the purchase of wagon wheels to be delivered within a year which gives the purchaser the option to take additional property up to a specified limit, is not within the statute as to the additional portion, since each order given constitutes an offer *pro tanto*.<sup>3</sup>

<sup>1</sup> Walker v. Bamberger, 17 Utah 239, 54 P. 108; see Brown v. Hall, 5 Lans. (N. Y.) 117; also Hines v. Cureton-Cole Co., 9 Ga. App. 778, 72 S. E. 191, and Sivell v. Hogan, 119 Ga. 167, 46 S. E. 67.

In Nagel v. Cohen, 112 N. Y. S. 1066, the owner of certain fixtures, valued at \$1800, agreed to sell them for that amount to J, who deposited with C \$100 to be paid to the owner if J did not purchase the fixtures as agreed, and the owner deposited an equal amount with C to be paid to J if the owner did not sell as agreed. The owner also agreed not to move the fixtures and to give J the exclusive option to purchase, and it was held the transaction was an option and not one of sale of goods, and was not, therefore, within the statute of frauds. The theory as it would seem was that an option contract, prior to election, is neither goods, wares, merchandise, nor "a thing in action."

Shares of stock in a corporation are not goods, wares, or merchandise, Rogers v. Burr, 105 Ga. 432, 31 S. E. 438, 70 A. S. R. 50, *contra*; Pray v. Mitchell, 60 Me. 430; Tisdale v. Harris, 37 Mass. (20 Pick.) 9; North v. Forest, 15 Conn. 400; see Mayer v. Child, 47 Cal. 142, thing in action; Thompkins v. Sheehan, 158 N. Y. 617, 53 N. E. 502, thing in action; Sprague v. Hosie, 155 Mich. 30, 118 N. W. 497, 130 A. S. R. 558, 19 L. R. A. (N. S.) 874.

<sup>2</sup> Kent v. Costin, (Minn.) 153 N. W. 874.

<sup>3</sup> Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 76 N. E. 294.



Defendant, prior to purchasing bonds, promised plaintiff that if, at any time, he became dissatisfied with the bonds, defendant would take them back on thirty days' notice, and return the money paid for them with interest, and it was held the agreement was not within the statute of frauds.<sup>4</sup>

An oral agreement by the vendor to repurchase the stock sold, at any time if desired by the purchaser, is not affected by the statute, as such oral agreement is a part of the executed sale.<sup>5</sup>

SEC. 404. AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR.—The wording of this clause of the statute differs slightly in the several states, but it is believed that, notwithstanding some slight verbal changes, the meaning of the clause as originally enacted in England has not been changed. The English statute applies to “any agreement that is not to be performed within a space of one year from the making thereof.” This clause has been construed as not applying to the performance of an act, or the happening of a contingency, which might possibly happen within the year.<sup>1</sup> In some states, by force of statute, it must

<sup>4</sup> *Fitzpatrick v. Woodruff*, 96 N. Y. 561; *Johnston v. Trask*, 116 N. Y. 136, 22 N. E. 377, 15 A. S. R. 394, 5 L. R. A. 630.

But a subsequent oral agreement to return is within the statute, *Rankins v. Grupe*, 36 Hun. (N. Y.) 481.

<sup>5</sup> *Gurwell v. Morris*, 2 Cal. App. 451, 83 P. 578; *Schaeffer v. Strieder*, 203 Mass. 467, 89 N. E. 618; *Hankwitz v. Barrett*, 143 Wis. 639, 128 N. W. 430; *Fay v. Wheeler*, 44 Vt. 292.

Otherwise in case of collateral agreement by third person to purchase, *Chamberlain v. Jones*, 52 N. Y. S. 998, 32 App. Div. 237; *Morse v. Douglass*, 99 N. Y. S. 392, 112 App. Div. 798, agent; *Korner v. Madden*, 152 Wis. 646, 140 N. W. 325.

<sup>1</sup> *Carter White Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536.

appear, from the terms of the agreement itself, that the parties did not contemplate it should be performed within the year.

An oral option contract does not fall within this clause of the statutes unless the right to elect is, by the terms of the option, postponed for more than one year from the "making thereof," since "performance" within the year is not impossible.<sup>2</sup>

An oral contract to sell certain stock at the end of three years, with option to purchaser to call it, at any time, may be performed within the year, and is, therefore, not within the statute.<sup>3</sup>

An oral agreement for leasing of premises for four months with option for an extension not exceeding three years, is not within the statute as a contract not to be performed within a year, the exercise of the option being a mere extension of the lease.<sup>4</sup>

<sup>2</sup> *Fairchild v. City etc. Co.*, 138 N. Y. S. 133, 153 App. Div. 277; see *McConathy v. Lanham*, 116 Ky. 735, 76 S. W. 535, 25 Ky. L. Rep. 971.

<sup>3</sup> *Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. 326, 3 L. R. A. 337; see *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869, affirmed 111 Ill. App. 606.

<sup>4</sup> *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434, the one-year clause applying only to personal property.

A lease for one year, with privilege of renewal for one or more years, on certain notice, is for a greater term than one year, and an agreement to take such lease should be in writing, *Donovan v. Schoenhofen Brewing Co.*, 92 Mo. App. 341.

But a parol lease of land made December 28, 1895, for a term of one year commencing January 1, 1896, is within the one-year clause of the statute, as the other clause of the statute authorizing a parol lease of land for one year must be construed with the former, *Wickson v. Monarch Cycle Mfg. Co.*, 128 Cal. 156, 60 P. 764, 79 A. S. R. 36, but the contrary is held by other courts, *Collins-Deitz-Morris Co. v. Elk City Mercantile Co.*, (Okl.) 150 P. 457.

A contract, by its terms, determinate within a year, but which may be continued longer, at the option of the parties, is not within the statute, *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28.

When period of one year to re-purchase commences, *Gurwell v. Morris*, 2 Cal. App. 451, 83 P. 578.

Return of horse, after expiration of one year, if not sound, and agreement to pay \$100 on return, is within statute, *Shipley v. Patton*, 21 Ind. 169.

An oral agreement by which a licensee of a process is given an exclusive right for one year, with option to then surrender his claim, or to continue his exclusive right for a further term of sixteen years, is within the statute,<sup>5</sup> and so is an oral contract requiring plaintiff to go out and create a market for defendant's coal.<sup>6</sup>

SEC. 405. CONTRACT OR MEMORANDUM THEREOF. SCOPE OF STATUTE.—The fourth section of the English statute of frauds and perjuries with reference to the subject matter in hand, provided “that no action shall be brought whereby to charge . . . any person upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

And the seventeenth section of the same statute provided “that no contract for the sale of any goods, wares and merchandises for the price of £10 sterling, or upwards, shall be allowed to be good,

<sup>4</sup> Renewal of contract for sale of lumber at purchaser's option is not within statute, *Byrne Mill Co. v. Robertson*, 149 Ala. 273, 42 So. 1008.

Option to terminate contract, *Blake v. Voigt*, 134 N. Y. 69, 31 N. E. 256, 30 A. S. R. 622; *Sterling Organ Co. v. House*, 25 W. Va. 64; *Wagniere v. Dunnell*, 29 R. I. 580, 73 Atl. 309; *Carter White Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536, employment.

<sup>5</sup> *Buhl v. Stephens*, 84 Fed. 922; see *Moore v. Vosburgh*, 72 N. Y. S. 696, 66 App. Div. 223.

<sup>6</sup> *Reigart v. Coke Co.*, 217 Mo. 142, 117 S. W. 61.

except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents, thereunto authorized."

We are here concerned with the sufficiency of the contract, or memorandum, and not with the particular act which takes the transaction out of the statute. It is well to note, however, that the statute does not apply to contracts created or implied by law,<sup>1</sup> nor to obligations arising from special statutes.<sup>2</sup> The purpose of the statute being to prevent oral evidence of executory contracts only, it is ruled the statute does not apply to a contract fully executed,<sup>3</sup> nor to promises implied by law,<sup>4</sup> nor, in certain cases, where the contract has been partly performed.<sup>5</sup>

<sup>1</sup> *Smith v. Bradley*, (Conn.) 1 Root 150.

<sup>2</sup> *Doolittle v. Dininny*, 31 N. Y. 350.

<sup>3</sup> *Fisher v. Wilson*, 18 Ind. 133, conveyance of real estate executed; *Jarboe v. Severin*, 85 Ind. 496; *Peabody v. Fellows*, 177 Mass. 290, 58 N. E. 1019; *Suggett v. Cason*, 26 Mo. 221; *Camp v. Barber*, 87 Vt. 235, 88 Atl. 812, personal property.

<sup>4</sup> The law implies a promise to pay the consideration where, pursuant to an oral contract to convey land, deed of conveyance is delivered and accepted, *Birch v. Baker*, 85 N. J. L. 660, 90 Atl. 297; *Malzer v. Schisler*, 67 Ore. 356, 136 P. 114; see *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057, involving option; *Keller v. Fitzgerrell*, 158 Ill. App. 534, affirmed 249 Ill. 451, 94 N. E. 926, sale fully executed and purchase money accepted; *Boone v. Coe*, 153 Ky. 233, 154 S. W. 900.

<sup>5</sup> See Sec. 418.

# SEC. 406. CONTRACT OR MEMORANDUM THEREOF. ESSENTIAL TERMS OF AGREEMENT MUST BE IN WRITING. EVIDENCE.

—The agreement, or memorandum thereof, must not only be in writing and subscribed by the party to be charged, but the agreement, or memorandum, must, also, to meet the requirements of the statute, show the parties,<sup>1</sup> set forth the essential terms of the agreement,<sup>2</sup> describe the subject matter suffi-

<sup>1</sup> *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485, 624, must show the relation of the parties as seller and buyer.

*Clason's Exrs. v. Bailey*, 14 Johns. (N. Y.) 484, sufficient if names of parties appear in body of memorandum, though not *signed*.

*Anderson v. Wallace Lumber etc. Co.*, 30 Wash. 147, 70 P. 247, sufficient where name of corporation appears in agreement, when written by agent who signed name of corporation below that of vendor.

<sup>2</sup> *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741, indefinite as to price, option giving "refusal" if premises are for sale.

Price to be offered by other parties, not indefinite, *Pearson v. Horne*, 139 Ga. 453, 77 S. E. 387; nor as to time, *Id.*

*Snow v. Nelson*, 113 Fed. 353, where time of first payment not fixed by memorandum.

*Hilberg v. Greer*, 172 Mich. 505, 138 N. W. 201, memorandum indefinite as to terms and time of payment, "purchase price to be \$5500, interest 5 per cent, easy terms."

The rule is stated in *Fritz v. Mills*, (Cal.) 150 P. 375, thus: "The memorandum must contain all the material elements of the contract; that is, it must show who is the seller and who is the buyer, what the price is and when it is to be paid, and must so describe the land that it can be identified."

In some states by statute, or by judicial interpretation, the consideration must be expressed in the writing. In others the consideration need not be expressed in the writing. See *Reid v. Diamond Plate-Glass Co.*, 85 Fed. 193, 29 C. C. A. 110; *Reid v. Alaska Packing Ass'n*, 43 Ore. 429, 73 P. 337; *Ewing v. Stanley*, 24 Ky. L. Rep. 633, 69 S. W. 724; *Chellis v. Grimes*, 72 N. H. 337, 56 Atl. 742; *Cooley v. Lobdell*, 153 N. Y. 596, 47 N. E. 783; *White v. Dahlquist Mfg. Co.*, 179 Mass. 427, 60 N. E. 791.

Minute entry of vote of school board as memorandum, *McManus v. City of Boston*, 171 Mass. 152, 50 N. E. 607.

ciently for identification,<sup>3</sup> and, in some jurisdictions, the consideration must be recited or shown.<sup>4</sup>

Parol evidence is not admissible to supply any essential term of the agreement,<sup>5</sup> or memorandum.<sup>6</sup>

**SEC. 407. CONTRACT OR MEMORANDUM THEREOF. SUBSCRIBING BY PARTY "TO BE CHARGED." AGENTS.**—The statute requires the writing to be signed or subscribed by the party to be charged only, or, by his authorized agent.<sup>1</sup>

<sup>3</sup> *Easton v. Thatcher*, 7 Utah 99, 25 P. 728; *Barnes v. Hustead*, 219 Pa. 287, 68 Atl. 839; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37; *Wilkins v. Hardaway*, 173 Ala. 57, 55 So. 817; *Pearson v. Horne*, 139 Ga. 453, 77 S. E. 387; *Broadway H. & S. v. Decker*, 47 Wash. 586, 92 P. 445; *Scherek v. Moyse*, 94 Miss. 259, 48 So. 513; *Eaton v. Wilkins*, 163 Cal. 742, 127 P. 71.

<sup>4</sup> *Wall v. Railway Co.*, 86 Wis. 48, 56 N. W. 367; *Broadway H. & S. v. Decker*, *supra*; *Johnston v. Wadsworth*, 24 Ore. 494, 34 P. 13, seal is expression of consideration.

Not necessary to state the price where it has been received, or if no price is agreed on and the property has been sold for what it is reasonably worth, *Taggart v. Hunter*, (Ore.) 150 P. 738.

<sup>5</sup> *Reigart v. Coke Co.*, 217 Mo. 142, 117 S. W. 61; *Ward v. Hashbrouck*, 169 N. Y. 407, 62 N. E. 434; *Broadway H. & S. v. Decker*, *supra*.

The description need not be so particular as to render resort to extrinsic evidence unnecessary. The description may be in general terms, *Eggleston v. Wagner*, *supra*.

<sup>6</sup> See *Walker v. Bamberger*, 17 Utah 239, 54 P. 108; *Scherek v. Moyse*, 94 Miss. 259, 48 So. 513; *Wagniere v. Dunnell*, 29 R. I. 580, 73 Atl. 309.

<sup>1</sup> *Davis v. Robert*, 89 Ala. 402, 8 So. 114, 18 A. S. R. 126; *Moses v. McClain*, 82 Ala. 370, 2 So. 741; *Vassault v. Edwards*, 43 Cal. 458; *Copple v. Aigeltinger*, 167 Cal. 706, 140 P. 1073; *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703, overruling dicta in 75 Ga. 350; *Ellis v. Bryant*, 120 Ga. 890, 48 S. E. 352; *Perkins v. Hadsell*, 50 Ill. 216, saying *Lawrenson v. Butler*, 1 Sch. & Lef. 13, often overruled; *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; *Maynard v. Brown*, 41 Mich. 298, 2 N. W. 30; *Peevey v. Haughton*, 72 Miss. 918, 17 So. 378, 18 So. 357, 48 A. S. R. 592; *Aiple etc. Co. v. Spelbrink*,

In many jurisdictions, it is expressly provided by statute that the authority of an agent to execute an agreement on behalf of his principal, required by the statute to be in writing, must also be in writing and subscribed by the principal.<sup>2</sup>

A lessor is not bound by a covenant of renewal, or by an option clause, inserted in a lease by his agent who is not authorized to do so in writing.<sup>3</sup>

Where defendant and K, owners of certain land, entered into a partnership for the purpose of selling land, and K authorized defendant to exercise entire management and control thereof, and K was thereafter informed that defendant had given an option for the sale of land, for a specified price, to plaintiff's assignor and acquiesced therein, defendant's signature to the option was, in effect, in behalf of himself and K, and was sufficient to bind her within the statute of frauds, though defendant's offer to act as K's agent rested in parol.<sup>4</sup>

Where a land contract was assigned by the vendee and the vendor, in pursuance thereof, conveyed to the assignee, an objection by a third party,

211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652; *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360; *Miller v. Cameron*, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554, signed by vendee and suit by vendor for specific performance; *Smith's Appeal*, 69 Pa. St. 474; *Borel v. Mead*, 3 N. Mex. 84, 2 P. 222; *Gira v. Harris*, 14 S. D. 537, 86 N. W. 624; *Central Land Co. v. Johnson*, 95 Va. 223, 28 S. E. 175, vendee; *Monongah Coal etc. Co. v. Fleming*, 42 W. Va. 538, 26 S. E. 201; *Cheney v. Cook*, 7 Wis. 413; *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979; *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404; *Vance v. Newman*, 72 Ark. 359, 80 S. W. 574, 105 A. S. R. 42.

<sup>2</sup> See *Newlin v. Hoyt*, 91 Minn. 409, 98 N. W. 323.

<sup>3</sup> *Rogan v. Arnold*, 233 Ill. 19, 84 N. E. 58, affirming 135 Ill. App. 281.

<sup>4</sup> *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887.

holding under a lease in which the contract was expressly recognized, that such contract was invalid because executed in behalf of vendee by an agent without authority in writing, is without merit. The deed by the vendor ratified the contract by the agent.<sup>5</sup>

SEC. 408. MODIFICATION OF TERMS. GENERALLY.—The statute, as we have seen, requires the contract, or the memorandum thereof, falling within its provisions, to be in writing. The writing required by the statute is one setting forth all the essential terms of the agreement, and this is true whether the writing is a formal contract or a memorandum. From this it follows that the essential terms of the agreement of the parties may not, under the statute, be evidenced in part by writing and in part by parol.<sup>1</sup>

A modification of a written contract may be with reference to some essential term of the agreement or with reference to matters or stipulations not deemed essential. The rule on the subject seems to be well established. The cases substantially agree that no modification of an essential term of the contract by an oral executory agreement between the parties, is permissible. The conflict in the cases arises largely, if not entirely, from the point of view, as to whether a particular stipulation or pro-

<sup>5</sup> *Heman v. Wade*, 140 Mo. 340, 41 S. W. 740.

<sup>1</sup> *Snow v. Nelson*, 113 Fed. 353, holding the effect of an oral modification is to render the whole contract oral.

The substitution of a new and different agreement for the original, of course, falls within the statute, *Clark v. Fey*, 121 N. Y. 470, 24 N. E. 703.



vision is an essential term of the contract. If it is, then the modified term must be evidenced by writing; if it is not, it may rest in parol.

The rule requiring the modification to be in writing, however, is subject to the qualification that the conduct of the parties growing out of a parol modification may be such as make applicable the rule of estoppel.<sup>2</sup>

SEC. 409. EXTENSION OF OPTION TIME.—In England the rule formerly was that the mode or time of performance of a contract within the statute of frauds could be changed by proof of an oral executory contract.<sup>1</sup> The rule was based on the distinction between the contract which the statute required to be in writing and its performance, to which it was held the statute did not apply. The later rule in England, however, is that a contract within the statute can not be modified by an oral executory contract.<sup>2</sup>

<sup>2</sup> Oregon & W. R. Co. v. Elliott B. M. & L. Co., 70 Wash. 148, 126 P. 406.

<sup>1</sup> Cuff v. Penn, 1 Maule & S. 21.

<sup>2</sup> Stead v. Dawber, 10 Adol. & E. 57, 113 Eng. Reprint 22; Hickman v. Haynes, L. R. 10 C. P. 598; Marshall v. Lynn, 6 Mees. & W. 109.

In Morrell v. Studd, 83 L. J. Ch. 114, (1913) 2 Ch. 688, 109 L. T. 628, however, it is said that if notice of acceptance is not in time, the subsequent conduct of the proposer in continuing to negotiate with the offeree for three months after his acceptance with reference to details of the contract, such as securing the purchase money, without suggesting that the acceptance was out of time, was sufficient to show an implied agreement either to enlarge the term for acceptance, or to treat the actual acceptance as a proper acceptance; that such an implied agreement need not be in writing to satisfy the statute of frauds, because it is not a verbal alteration of the agreement required to be in writing, since the agreement required to be in writing is not complete and therefore not an agreement until a proper acceptance is given, and before an acceptance out of date

In this country the later English rule has quite generally been followed. The earlier English rule, however, has influenced some of the decisions of our courts, as will be seen in the following sections.

Before proceeding with the presentation of the several decisions on the subject, it should be noted that a parol extension of an option contract falling within the statute but given after the expiration of the option time limit, is invalid, since, in such case, the option has ended by expiration of its time limit and the whole contract must rest upon the parol agreement for the extension.<sup>3</sup>

SEC. 410. DECISIONS HOLDING PAROL EXTENSION INVALID.—The cases we are to consider now are those involving a parol executory agreement for extension of the time limit of the option and, also, the time for the performance of particular stipulations of the option.

The rule to be deduced from these decisions is that, in the absence of facts justifying the application of estoppel against the party orally granting the extension, evidence of an oral extension is not admissible.<sup>1</sup>

can be treated as proper, the implied or verbal agreement must of necessity be come to. The Court distinguished the leading case of *Goss v. Nugent*, 5 B. & Ald. 58, as deciding only that where a contract falling within the statute of frauds is once made, no contract or verbal waiver can be relied on to substitute a different term from one appearing in the contract itself.

<sup>3</sup> See *McConathy v. Lanham*, 116 Ky. 735, 25 Ky. L. Rep. 971, 76 S. W. 535; *Thompson v. Robinson*, 65 W. Va. 506, 64 S. E. 718.

<sup>1</sup> *Lawyer v. Post*, 109 Fed. 512, 47 C. C. A. 491; *Neldon v. Smith*, 36 N. J. L. 148; *Ladd v. King*, 1 R. I. 224, 51 Am. Dec. 624; *Jarman v. Westbrook*, 134 Ga. 19, 67 S. E. 403; *Adams v. Hughes*, (Tex. Civ. App.) 140 S. W. 1163; *Emerson v. Slater*, (U. S.) 22 How. 28, 16

Under the Maryland statute of frauds, requiring a contract for the sale of flour for a price in excess of that fixed by the statute, a verbal agreement for the extension of time for the deliveries is not admissible in evidence in an action for an alleged breach of such contract.<sup>2</sup>

A verbal extension of time within which to take timber from the land sold, is within the statute, and must be in writing to be valid, and reliance on the verbal extension and consequent delay in taking

L. Ed. 360; *Swain v. Seamens*, (U. S.) 9 Wall. 254, 19 L. Ed. 554; *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165; *Thompson v. Robinson*, 65 W. Va. 506, 64 S. E. 718; *Brown v. Sanborn*, 21 Minn. 402.

<sup>1</sup> In *Thomson v. Poor*, 147 N. Y. 402, 42 N. E. 13, it is said the rule in New York is not authoritatively settled, but *Blood v. Goodrich*, 9 Wend. 68, 24 Am. Dec. 121, is referred to as holding that time of performance of a written contract for sale of land could not be extended by parol, and *Blanchard v. Trim*, 38 N. Y. 225; *Flynn v. McKeon*, 6 Duer. 203; and *Stone v. Sprague*, 20 Barb. 509, as holding to the contrary. See, also, *Hasbrouck v. Tappen*, 15 Johns. 200.

*Athe v. Bartholemew*, 69 Wis. 43, 33 N. W. 110, 5 A. S. R. 103, sustains the rule but decides the case on another point.

See *Platt v. Butcher*, 112 Cal. 634, 44 P. 1060, extension of broker's agreement and holding oral agreement for extension not executed within the meaning of Civil Code, California, section 1624, providing that a contract in writing may be altered by an executed oral agreement; also *Hicks v. Post*, 154 Cal. 22, 96 P. 878; *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 P. 938.

The rule of the text is also applied by some decisions to a case where the modified term is one which, like time of performance, is expressly fixed by the written contract. If the parties have expressly stipulated, then parol evidence of a modification is not permissible, *Bonicamp v. Starbuck*, 25 Okl. 483, 106 P. 839; *Beller v. Robinson*, 50 Mich. 264, 15 N. W. 448; *Jarman v. Westbrook*, 134 Ga. 19, 67 S. E. 403.

<sup>2</sup> *Walter v. Victor G. Bloede Co.*, 94 Md. 80, 50 Atl. 433.

off the timber, is not such fraud as will take the case out of the statute.<sup>3</sup>

SEC. 411. DECISIONS HOLDING PAROL EXTENSION VALID.—The decisions falling under this section divide themselves into several classes. First, those holding that an extension, in itself, does not constitute a contract, that is, does not work a rescission of the original contract by substitution of a new contract and, therefore, is not within the statute.<sup>1</sup> Secondly, those cases where the oral contract has been executed, on the theory that an executed oral contract takes the place of the written contract.<sup>2</sup> Thirdly, that numerous class of decisions based on estoppel or waiver.<sup>3</sup> To these may be added some miscellaneous decisions to which reference will be made in the notes.<sup>4</sup>

<sup>3</sup> *Clark v. Guest*, 54 Ohio St. 298, 43 N. E. 862; also *Hicks v. Post*, 154 Cal. 22, 96 P. 878; *Hasbrouck v. Tappen*, (N. Y.) 15 Johns. 200.

<sup>1</sup> *Stamey v. Hemple*, 173 Fed. 61, 97 C. C. A. 379; *Stearns v. Hall*, 63 Mass. (9 Cush.) 31; *Whittier v. Dana*, 92 Mass. 326.

*Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 893, 106 A. S. R. 881, 1 Ann. Cas. 986, when supported by some new and sufficient consideration; *Hetzel v. Lyon*, 87 Neb. 261, 126 N. W. 997, broker's agreement.

<sup>2</sup> *Walker v. Bamberger*, 17 Utah 239, 54 P. 108; *Bailey v. Bishop*, 152 N. C. 383, 67 S. E. 968; *Blake v. J. Neils L. Co.*, 111 Minn. 513, 127 N. W. 450; *Gerard-Fillio Co. v. McNair*, 68 Wash. 321, 123 P. 462; *Phillips v. Holland*, 149 Wis. 524, 136 N. W. 191, consideration for extension paid; *Swon v. Stevens*, 143 Mo. 384, 45 S. W. 270, consideration for extension paid; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376, agreement to repurchase shares of stock.

<sup>3</sup> *McCarty v. Helbing*, (Ore.) 144 P. 499. See next section.

<sup>4</sup> Statute does not apply to an option for extension of time of a leasehold term contained in the lease. *Remm v. Landon*, 43 Ind. App. 91, 86 N. E. 973; *McClelland v. Rush*, 150 Pa. 57, 24 Atl. 354, waiver of written notice.

It will be observed that with reference to many of the decisions cited in this section as well as those cited in the preceding sections, that while, in a particular case, the court lays down the law as a matter of principle, the decision is made to turn on the application of some equitable rule.

SEC. 412. EXTENSIONS. ESTOPPEL.—As we pointed out in a preceding section, the rule established by the decisions requiring the agreement for an extension to be in writing, is qualified by the rule of estoppel.

Equity will not permit the statute to be used to perpetrate a fraud. If the optionee is induced by a subsequent oral agreement for an extension of the time of payment, to make default in payment as called for by the written option, the optionor can not invoke the statute in equity and thus make the oral agreement invalid.<sup>1</sup>

<sup>4</sup> *Contra*, where lease requires written notice and the extension is for three years, the statute declaring void oral lease for more than one year, *Beller v. Robinson*, 50 Mich. 264, 15 N. W. 448.

In *Packer v. Stewart*, 34 Vt. 27, it is held that when the contract is taken out of the statute by payment of earnest money, it may be varied by parol as to time of its performance.

Parol extension fixing date of election *beyond* one year would come within the statute, see Sec. 404.

<sup>1</sup> *Kingsley v. Kressly*, 60 Ore. 167, 118 P. 678, Anno. Cases 1913E, 746; *Neppach v. Railroad*, 46 Ore. 374, 80 P. 482, 7 Ann. Cas. 1035; see *Witman v. City of Reading*, 191 Pa. 134, 43 Atl. 140; *Sheppard v. Rosenkrans*, 109 Wis. 58, 85 N. W. 199, 83 A. S. R. 886; *Thompson v. Poor*, 147 N. Y. 402, 42 N. E. 13; *Ladd v. King*, 1 R. I. 224, 51 Am. Dec. 624; *Doar v. Gibbes*, 1 Bailey Eq. (S. C.) 371; *Wilkins v. Evans*, 1 Del. Ch. 156.

*Packer v. Stewart*, 34 Vt. 27, oral agreement extending time of performance of oral contract taken out of statute by part payment, valid.

See *Hasbrouck v. Tappen*, 15 Johns. 200.

Accordingly, where the optionee was arranging to raise money to make a tender within the option time, and was requested by the optionor to defer the tender for a year, to which the optionee agreed, and thereafter and within the year, tendered the amount required, which was refused, it was held the optionor was estopped to claim the agreement was not enforceable under the statute.<sup>2</sup>

So, where upon presenting an abstract from which it was found that the title was defective, and by mutual agreement between the parties, the time within which the transaction was to be closed was extended thirty days, and within the thirty days the vendee tendered performance in accordance with the provisions of the agreement.<sup>3</sup>

So, where the optionor, to get the optionee to make an advance payment, induced him to believe that by making the advancement, a certain installment, maturing at a certain subsequent date, would be extended.<sup>4</sup>

<sup>2</sup> *Alston v. Connell*, 140 N. C. 485, 53 S. E. 292; see *Hurlburt v. Fitzpatrick*, 176 Mass. 287, 57 N. E. 464.

The circumstances must be such as to constitute "an independent equity"; mere breach of the oral agreement is not such equity, *Henderson v. Henrie*, 68 W. Va. 562, 71 S. E. 172, 34 L. R. A. (N. S.) 628.

<sup>3</sup> *Kissack v. Bourke*, 224 Ill. 352, 79 N. E. 619; this decision was put on the ground that any party has a right to waive a strict compliance with the terms of the contract and that proof of such waiver may consist of acts in pais; s. c. 242 Ill. 233, 89 N. E. 990.

<sup>4</sup> *Scott v. Hubbard*, 67 Ore. 498, 136 P. 653; this decision was placed on the ground that where a party to a written contract orally agrees to extend the time for its payment and puts the other party off his guard, he is estopped from taking advantage of the non-compliance with the terms of the writing and the other party will have the extended time within which to discharge the modified agreement.

SEC. 413. EXTENSIONS. WAIVER.—The courts sometimes base their decisions upon the rule of waiver. The theory is that the statute does not condemn as void the particular contracts falling within its provisions, and being intended as a protection to the party to be charged, there is nothing to prevent him from waiving the protection of the statute. Accordingly, it is held that where the conduct of the party to be charged is such as to amount to a waiver, the court will not permit him to interpose the defense.

A New York case is typical of this class of decisions. Plaintiff and defendant entered into an agreement by the terms of which plaintiff sold to defendant the bark on certain trees at a specified price, not less than 1000 cords to be peeled each year for a period of ten years. In 1886 defendant peeled only 500 cords. Plaintiff brought suit to recover damages for the breach and defendant answering set up an oral agreement between the parties limiting the amount to be peeled in 1886 to 500 cords. Plaintiff orally consented to the modification and defendant acting thereon peeled only 500 cords for the year 1886, and, of course, relying

4 Kingston v. Walters, 16 N. M. 59, 113 P. 594, the Court saying that where a representation as to the future relates to an intended abandonment of an existing right and is made to influence others and they have been influenced by it to act, it operates as estoppel.

The rule of estoppel, however, is not available to the optionee unless he has timely and properly elected and performed, Hanes v. Newport, 134 Ill. App. 453.

The equitable rule may, on proper facts, be invoked by the optionor, Daniels v. Rogers, 108 App. Div. 338, 96 N. Y. S. 624.

Evidence to establish a parol modification of a written contract must be clear, etc., Eagle v. Pettis, 109 Ark. 310, 159 S. W. 1116. See Scott v. Hubbard, 67 Ore. 498, 136 P. 653, holding evidence of parol extension is admissible.

on the oral agreement permitted the contract time to pass without performance of the original contract. The court said plaintiff was estopped on the facts to recall his consent to the modification and to treat the non-performance within the original time as a breach; that the original contract was not changed by such waiver but that it stood as an answer to the other party (plaintiff) who sought to recover damages for non-performance induced by an unrecalled consent, and referring to contracts both within and without the statute of frauds said the rule is well understood that if there is forbearance at the request of a party the latter is precluded from insisting upon non-performance, at the time originally fixed by the contract, as a ground of action, and then remarked that the case was not so manifest where the party who solicited the forbearance alleged the consent of the other party as an excuse for non-performance. It was held plaintiff was estopped and, therefore, was not entitled to recover damages. The court, however, clearly lays down the rule that evidence of a parol agreement to prove a modification, was not admissible, but was admissible to prove a waiver of the provision as to time of performance.<sup>1</sup>

<sup>1</sup> *Thompson v. Poor*, 147 N. Y. 402, 42 N. E. 13; also *Scheerschmidt v. Smith*, 74 Minn. 224, 77 N. W. 34; *Kissack v. Bourke*, 224 Ill. 352, 79 N. E. 619; *Smiley v. Barker*, 83 Fed. 684, 28 C. C. A. 9; *McClelland v. Rush*, 150 Pa. 57; 24 Atl. 354; *Morrell v. Studd*, 83 L. J. Ch. 114 (1913), 2 Ch. 648, 109 L. T. 628.

The doctrine of waiver, if limited to the class of cases out of which it was evolved, is a wholesome one. But when it is attempted to apply it to other cases much confusion arises, as attested by the decisions of the courts. The rule grew out of cases involving contracts for the periodical payment of money, or the performance of a series of acts, like the payment of rent under a lease, premium on an insurance policy, and barking a certain number of trees annually,



**SEC. 414. ORAL ELECTION OF ACCEPTANCE. REQUIREMENTS OF PARTICULAR STATUTES.**—An election under an option contract not required by the statute of frauds to be in writing, as well, also, as the acceptance of an offer of a contract which does not fall within the pro-

as in the New York case cited, and such like, the time of performance in the contract being fixed and frequently made of its essence, and the debtor being penalized and his rights forfeited for his failure strictly to perform. In these cases, if the creditor receives payments, after the contract time, as a matter of practice, or under an oral agreement or understanding, he is said to waive a strict timely performance of the contract; that is, to waive payment or performance on the day stipulated, and therefore, if the debtor, relying upon the conduct, or the oral agreement or understanding, fails to make payment, or perform the act, on the precise day fixed by the contract, the creditor may not forfeit his rights under the contract by reason of such default. This is the so-called doctrine of waiver, and under it the Court will not permit the creditor to forfeit the rights of the debtor. The doctrine is one akin to equitable estoppel, and like estoppel, is based upon acts. It does not modify or change the original contract, for the creditor may give notice of his intention to insist upon a strict performance of the contract henceforth, and thus hold the debtor to a strict performance as to all subsequent payments or acts. It will be seen, therefore, that the rule of waiver has no application to an option contract required by the Statute of Frauds to be in writing. The optionee under an option contract, prior to election, has no rights in the property subject to forfeiture, and that doctrine has no application to such contracts. Again, election is a single act, and, consequently, there is no prior conduct upon which to base the doctrine of waiver. Waiver, therefore, if applied to election, must be based upon the oral agreement and no Court has yet held, so far as we know, that a mere naked, oral agreement, extending time under a contract within the Statute of Frauds, works either a waiver or estoppel. Unless, therefore, there is something to supplement the oral agreement—that is, facts and conduct on the part of the optionor, relied upon by the optionee, which amount to an equitable estoppel—the doctrine of waiver has no application, and it has no application, even in the case stated, for, if there is such conduct, the facts bring it within the rule of estoppel and not within the rule of waiver. As thus viewed, it would seem that equitable estoppel is something essentially different from waiver. See Secs. 868, 869.

visions of that statute, may be oral<sup>1</sup> unless, by the terms of the option, or of the offer, a written election or acceptance is required,<sup>2</sup> and unless, also, the optionee is required to perform some act as a substitute for, or in addition to, the formal notice above referred to.<sup>3</sup>

Where the option contract or offer falls within a particular or special statute, the character and sufficiency of the election, or acceptance, required must be determined by reference to the provisions of that statute.

Thus, the Alabama statute provides that a contract for the sale of land, etc., is void unless the purchase money, or a portion thereof, be paid and the purchaser be put into possession of the land by the seller. The owner of land gave a written lease with option to the lessee to purchase. An election to purchase under the option was made by the agent of the lessee whose authority to do so was not in writing as required by the same statute, and it was held that since neither part of the purchase money was paid, nor possession taken under the option, the election, in law being oral, was insufficient.<sup>4</sup>

<sup>1</sup> Secs. 415, 816.

<sup>2</sup> *Bosshardt v. Crescent Oil Co.*, 171 Pa. 109, 32 Atl. 1120; *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057.

<sup>3</sup> As payment of part of the price, in which case, of course, payment is part of the election or acceptance, *Wardell v. Williams*, 62 Mich. 50, 28 N. W. 796, 4 A. S. R. 814.

Also *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057.

<sup>4</sup> *Linn v. McLean*, 85 Ala. 250, 4 So. 777; see, also, *Jarman v. Westbrook*, 134 Ga. 19, 67 S. E. 403.

SEC. 415. SAME. ORAL ELECTION SUFFICIENT IN MOST STATES.—On the other hand, under provisions of statutes common to many jurisdictions, covering the sale of real and personal property, and requiring merely that the contract shall be in writing, or evidenced by a memorandum, and subscribed by the party to be charged, it is held that so far as the statute is concerned, an oral election by the optionee of an option contract falling within its provisions, is sufficient to bind the optionor, provided the contract, or the memorandum thereof, or the offer or proposal, as the case may be, is in writing and subscribed by the optionor,<sup>1</sup> and provided further, that all the essen-

<sup>4</sup> *Newlin v. Hoyt*, 91 Minn. 409, 98 N. W. 323, also involved the authority of the agent to make an oral acceptance. In this case there was an exchange of lands with option to one of the parties to examine the property of the other and if satisfied to "accept the contract" and it was held that a written acceptance was necessary.

Parol acceptance is not sufficient under Nebraska statute requiring the contract to be subscribed by both parties, *Spence v. Apley*, 4 Neb. 358, 94 N. W. 109; *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360. The Montana and Michigan statutes require the writing to be signed by the party by whom the sale is to be made, *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; *Maynard v. Brown*, 41 Mich. 298, 2 N. W. 30.

In Oklahoma an oral acceptance of an order for cement in excess of \$50 is invalid, *Altoona Portland C. Co. v. Burbank*, (Okl.) 143 P. 845.

<sup>1</sup> *Sanborn v. Flagler*, 91 Mass. (9 Allen) 474; *Lydg v. Braman*, 177 Mass. 212, 58 N. E. 696; *Himrod F. Co. v. Cleveland & M. R. Co.*, 22 Ohio St. 451; *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; *Bogle v. Jarvis*, 58 Kan. 76, 48 P. 558, offer by letter orally accepted, and executed in part; *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360, option in lease; *George etc. Co. v. Maxwell*, 78 Ohio St. 54, 84 N. E. 595, option to lease; *Smith's Appeal*, In re, 69 Pa. 474; *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118, option in lease; *Souffrain v. McDonald*, 27 Ind. 269; *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404, affirmed 78 N. J. Eq. 305, 81 Atl. 1133; *Copple v. Aigeltinger*, 167 Cal. 706, 140 P. 1073; *Willis v. Ellis*, 98 Miss. 197, 53 So. 498; *Maine v. Howell*, 7 Ga. App. 311, 66 S. E. 804; *Jarman v. West-*

tial terms of the contract are set forth in the writing or memorandum,<sup>2</sup> for, the election being oral, if the essential terms of the contract are not set forth in the written option or written offer, or a memorandum thereof, there is no contract to which an oral acceptance alone can give legal life.<sup>3</sup> And

brook, 134 Ga. 19, 67 S. E. 403; *Friendly v. Elwert*, 57 Ore. 599, 105 P. 404, 112 P. 1085; *Warner v. Willington*, 3 Drew. 523, 25 L. J. Ch. 662; *Smith v. Neale*, 2 C. B. (N. S.) 67, 26 L. J. C. P. 143, 3 Jur. (N. S.) 516; *Reuss v. Picksley*, L. R. 1 Exch. 342, 12 Jur. (N. S.) 628, 35 L. J. Ch. 218, 15 L. T. Rep. 25, 14 Wkly. Rep. 924; *Stewart v. Eddowes*, L. R., 43 L. J. C. P. 204, 9 C. P. 311, 30 L. T. Rep. 333, 22 Wkly. Rep. 534; *Dickinson v. Dodds*, L. R. 2 Ch. Div. 463, 34 L. T. (N. S.) 607; *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057.

<sup>1</sup> *Fox v. Hawkins*, 135 N. Y. S. 245, distinguishing *Wadick v. Mace*, 191 N. Y. 1, 83 N. E. 571, and *Levin v. Dietz*, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. (N. S.) 251, and referring to *Carney v. Pendleton*, 139 App. Div. 152, 123 N. Y. S. 738, where it is said that in the *Wadick* case the decision was put on the ground the agreement expressly waived the remedy of specific performance, and in the *Levin* case there was a withdrawal before acceptance. See, also, *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190, oral acceptance.

There are cases holding to the contrary, *Athe v. Bartholemew*, 69 Wis. 43, 33 N. W. 110, 5 A. S. R. 103, where time was fixed; *Lanz v. McLaughlin*, 14 Minn. 72; *Newberger v. Adams*, 92 Ky. 26, 17 S. W. 162, 13 Ky. L. Rep. 339; *Goodspeed v. Wiard Plow Co.*, 45 Mich. 322, 7 N. W. 902; *Wilkinson v. Havenrich*, 58 Mich. 574, 26 N. W. 139; *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586; *Foster v. New York & T. L. Co.*, 2 Tex. Civ. App. 505, 22 S. W. 260; *contra*, *Anderson v. Tinsley*, (Tex. Civ. App.) 28 S. W. 121; *Rector Provision Co. v. Sauer*, 69 Miss. 235, 13 So. 623.

<sup>2</sup> *Pettibone v. Moore*, 27 N. Y. S. 455, 75 Hun. 461; *Black v. Crowthers*, 74 Mo. App. 480; *Monahan v. Allen*, 47 Mont. 75, 130 P. 768.

Written acceptance of oral offer which acceptance does not contain the terms of the contract is invalid, *Washington Ice Co. v. Webster*, 62 Me. 341, 15 Am. Rep. 462; see *Gummer v. Trustees*, 45 Wis. 384, oral acceptance of written offer to purchase.

<sup>3</sup> Where the offer or the option contains all of the essential terms of the contract, an acceptance, or an election, is nothing more than the performance (it is not a term) of the contract, when the writing leaves the kind of notice and the mode of its communication to implication, see *Bogle v. Jarvis*, 58 Kan. 76, 48 P. 558.

in this connection it is pertinent to remark that an option, or a memorandum thereof, defective in the particular above mentioned, can not be helped out or supplemented by an oral election, as the contract would rest in parol and, therefore, be invalid.<sup>4</sup> And further, that an oral election which is conditional, that is, varies any essential term of the original written option contract, as well as an oral counter proposition, clearly falls within the provision of the statute, since the new, but essential, term of the contract would rest in parol and the whole transaction would fall within the statute.<sup>5</sup>

SEC. 416. ORAL ELECTION OR ACCEPTANCE. MUTUALITY.—In the next preceding section the rule was considered from the viewpoint that the optionee was seeking to enforce the option contract and that the optionor was the party to be charged. An oral election or acceptance by the optionee is sufficient to charge the optionor who has subscribed the option, but it is not sufficient, at the suit of the optionor, to charge the optionee who has not subscribed written evidence of his election, or otherwise bound himself to the performance of the same.<sup>1</sup>

This situation, on first impression, would seem to be one at variance with the requirements of the

<sup>4</sup> *Snow v. Nelson*, 113 Fed. 353.

<sup>5</sup> *Lewis v. Johnson*, 123 Minn. 409, 143 N. W. 1127; see *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118; *Newberger v. Adams*, 92 Ky. 26, 17 S. W. 162, 13 Ky. L. Rep. 339; *Wardell v. Williams*, 62 Mich. 50, 28 N. W. 796, 4 A. S. R. 814; *Farwell v. Lowther*, 18 Ill. 252; *Waul v. Kirkman*, 27 Miss. 823; see *Willis v. Ellis*, *supra*.

<sup>1</sup> See next section.

rule of mutuality, but it is not.<sup>2</sup> There are no equitable principles as distinguished from legal principles, involved in the mere act of election or acceptance. It is the performance of a condition imposed by the terms of the option contract, the effect of the performance of which is to turn the option into a bilateral contract and place the optionee in a position where he may enforce his rights growing out of the contract. And besides the Statute of Frauds, so far as involved here, is a mere rule of evidence. When, however, it is sought to enforce such rights, in a court of equity, it is then that the rule of mutuality becomes applicable. So that it can be laid down that while an oral election or acceptance by the optionee is sufficient to meet the requirements of the Statute of Frauds as a rule of evidence, it is not sufficient to meet the requirements of the equitable rule of mutuality, and that unless the optionee has done some act, such as filing a complaint for specific enforcement of the contract, the effect of which is to bind him, by writing or otherwise, to the performance of the contract at the instance of the optionor, the optionee has no standing in a court of equity<sup>3</sup> as a plaintiff, where that defense is interposed.<sup>4</sup>

<sup>2</sup> Alabama etc. Ins. Co. v. Oliver, 82 Ala. 417, 2 So. 445, saying, "The difficulty is not that the contract or agreement is not mutual, but that each party has not corresponding evidence of it."

<sup>3</sup> The effect of lack of mutuality of remedy and lack of evidence requisite for proof of the contract does not arise at law where the statute requires the signature only of the party to be charged. Alabama etc. Ins. Co. v. Oliver, *supra*.

<sup>4</sup> Bosshardt & W. Co. v. Crescent Oil Co., 171 Pa. St. 109, 32 Atl. 1120; Ellis v. Bryant, 120 Ga. 890, 48 S. E. 352, letters; Vassault v. Edwards, 43 Cal. 458; Levin v. Dietz, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. (N. S.) 251; Krah v. Wassmer, 75 N. J. Eq. 109, 71 Atl.

**SEC. 417. SAME. RIGHTS OF OPTIONOR UNDER ORAL ELECTION.**—The question whether the optionee, by his oral election, has raised a contract which can be enforced by the optionor does not seem to have been directly decided. The occasion for a decision on this point would necessarily be extremely rare since if the optionee does not desire to elect, he permits the option to lapse.<sup>1</sup> However, there seems to be an assumption running through the cases that the optionor, in the case stated, would not be able to prove a contract meeting the requirements of the statute, that is to say, a contract subscribed by the party to be charged.<sup>2</sup>

The mischief sought to be prevented by the enactment of the English statute which is the prototype of the respective statutes of the several states, was, as it recites, “the prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury.”

404, affirmed 78 N. J. Eq. 305, 81 Atl. 1135; *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 30 A. S. R. 47, 11 L. R. A. 148; *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703, 705; *Peevey v. Haughton*, 72 Miss. 918, 17 So. 378, 18 So. 357, 48 A. S. R. 592; *Moses v. McClain*, 82 Ala. 370, 2 So. 741; *Foster v. New York & T. Land Co.*, 2 Tex. Civ. App. 505, 22 S. W. 260.

- <sup>1</sup> *Montgomery v. Waldeck*, 2 Alaska 581, holding that the optionor could not maintain a suit to recover the price of the optioned property where the optionee had not subscribed the writing, it containing a stipulation binding him to accept the option, which he never did.

As bearing on the rule laid down in this section, see *Newberger v. Adams*, 92 Ky. 26, 17 S. W. 162, 13 Ky. L. Rep. 339; *Lanz v. McLaughlin*, 14 Minn. 72; *Pettibone v. Moore*, 27 N. Y. S. 455, 75 Hun. 461; *Judge v. Cash*, 5 Ky. L. Rep. 514.

- <sup>2</sup> *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637, is based upon a special statute.

It needs no argument to show that the statute was intended to apply to the party desiring to prove the contract and the statute has quite uniformly been so construed,<sup>3</sup> so that as fitting the facts of practically all the cases which have come to our attention, it may be said that the party to be charged is the defendant, and so far as the case under consideration is concerned, the party to be charged is the optionee.

The optionee has not subscribed any writing. Keeping in mind that the bilateral contract we are considering comes into existence by virtue of an oral election and that, therefore, proof of the contract depends upon proof of an oral election, the conclusion is irresistible that to allow such proof

<sup>3</sup> That party to be charged is the defendant, see *Montgomery v. Waldeck*, *supra*; *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; *George etc. Co. v. Maxwell*, 78 Ohio St. 54, 84 N. E. 595; *Peevey v. Haughton*, 72 Miss. 918, 17 So. 378, 18 So. 357, 48 A. S. R. 592.

*Monongah C. & C. Co. v. Fleming*, 42 W. Va. 538, 26 S. E. 201; *Newby v. Rigers*, 40 Ind. 9; *Maine v. Howell*, 7 Ga. App. 311, 66 S. E. 804; *Alabama K. L. Ins. Co. v. Oliver*, 82 Ala. 417, 2 So. 445; *Cavanaugh v. Casselman*, 88 Cal. 543, 26 P. 515; *Vance v. Newman*, 72 Ark. 359, 80 S. W. 574, 105 A. S. R. 42.

However, in Tennessee it is held that the "party to be charged" is the owner of the property, *Lusky v. Keiser*, 128 Tenn. 705, 164 S. W. 777.

Of course, if the vendee or optionee has subscribed the writing, the vendor may maintain a suit on it, *Miller v. Cameron*, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Levin v. Dietz*, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. (N. S.) 251. So, also, where the election is in writing and subscribed, *Boston & W. St. Ry. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498.

In *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228, 231, it is said that upon election an obligation arises on the part of the optionee to pay the price; but this was said in a suit where the optionee was seeking specific performance and with reference to the point that the optionee was obliged to pay, notwithstanding there was no express provision for him to do so.



is to throw open the very door which the statute intended to close. We can reach no other conclusion than that, under the statute and on the facts stated, evidence to prove an oral election by an optionee is not admissible in any suit or proceeding either at law or in equity in which the optionor is seeking the enforcement of rights growing out of such transaction.<sup>4</sup>

<sup>4</sup>In a note to 6 L. R. A. (N. S.) 397, it is said by the annotator that the optionor has an action at law if the optionee orally accepts. This statement is evidently based on the assumption that the equitable rule of mutuality is controlling. Clearly, this is a wrong assumption. Mutuality is peculiar to equitable proceedings. It has nothing to do with proof of a contract required to be in writing. The Statute of Frauds demands written evidence of a contract falling within its provisions and there is not one rule for equity and another for law. Mutuality is an accident and is not the reason. As said in *Heflin v. Milton*, 69 Ala. 354, "The difficulty is not that the contract or agreement is not mutual, but that each party has not corresponding evidence of it." See, also, *Alabama etc. Ins. Co. v. Oliver*, 82 Ala. 417, 2 So. 445.

The conclusion reached in the text is not at variance with the rule obtaining with reference to deeds of conveyance, leases, and other like instruments in writing, containing covenants on the part of the lessee or the grantee who has not subscribed or signed the writing. Indentures, as is well known, are signed and executed by both parties and therefore are not in point. A deed poll is executed by the grantor alone and the rule is that the acceptance of such a deed by the grantee binds him to the performance of the covenants therein on his part, see *Gale v. Nixon*, 6 Cow. (N. Y.) 445; *Kirk v. Williams*, 24 Fed. 437, price. And the same is true of a lease signed only by the lessor. However, the rule is sometimes qualified by adding that the grantee must have acted under the instrument and the contract must have been fully performed. See *Merchants Coal Co. v. Billmeyer*, 54 W. Va. 1, 46 S. E. 120, lease; *West V. C. & P. R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696, lease; *Noland v. Cincinnati C. Co.*, 26 Ky. L. Rep. 837, 82 S. W. 627, deed.

Somewhat similar to the above is the case of a lease containing an option giving the lessee the right to continue the term of the lease by serving a written notice on the lessor to that effect a specified time before the expiration of the leasehold term. A holding over by the tenant would in itself, in some cases, have the effect of continuing the original lease and, consequently, an oral notice to extend

SEC. 418. PART AND FULL PERFORMANCE.—At law, part performance of an oral contract required by the Statute of Frauds to be in writing, does not take it out of the statute unless the statute so provides.<sup>1</sup> In equity, however, the rule is otherwise. In England and in nearly all of the American States the established rule is that part performance, by one of the parties, of an

would not fall within the provisions of the Statute of Frauds. If the stipulation is one to renew, a different rule would apply in some jurisdictions, see *Sheppard v. Rosenkrans*, 109 Wis. 58, 85 N. W. 199, 83 A. S. R. 886; see, also, *Byrne Mill Co. v. Robertson*, 149 Ala. 273, 42 So. 1008; *Dockery v. Thorne*, (Tex. Civ. App.), 135 S. W. 593; Secs. 831-834.

- <sup>4</sup> The rule stated in the text is on the assumption that the election or acceptance consists only of the oral notification. But the conclusion reached would not be different if the oral election was in a case where there had been part performance of the contract by the optionee. The doctrine of part performance is based on estoppel and not on contract, except, of course, that as a matter of judicial form the part performance must arise out of possession taken, improvements made, or money paid, under the oral contract. The rule being based on estoppel in favor of the optionee as against the optionor and there being an equity furnished to the optionee, it is not available to the optionor as a means of taking the oral election out of the statute. In other words, part performance does not make a contract, nor strictly speaking, does it make an election; it estops the optionor from taking advantage of a set of circumstances which would work a fraud on the optionee. An oral election and part performance do not, therefore, place the optionor in a position to enforce the option against the optionee where the Statute of Frauds is set up as a defense.

- <sup>1</sup> *Kling v. Bordner*, 65 Ohio St. 86, 61 N. E. 148; *Sigmund v. Newspaper Co.*, 82 Ill. App. 178; *Chenoweth v. Pacific Exp. Co.*, 93 Mo. App. 185; *Kimmins v. Oldham*, 27 W. Va. 258; *McElroy v. Ludlum*, 32 N. J. Eq. 828; *Hamilton v. Thirston*, 93 Md. 213, 48 Atl. 709.

In some of the states the statute expressly provides what performance will take the contract out of the statute, *Hurst v. Jenkins*, 161 Iowa 414, 143 N. W. 401; *Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67.

At law, full and complete performance by one party will take the oral agreement out of the statute, *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586.

oral executory contract for an interest or estate in lands will be specifically enforced<sup>2</sup> at the suit of such party.<sup>3</sup> The act relied upon as part performance must be clearly referable to the option agreement, such for instance, as where the purchaser has taken possession under the option contract and paid the purchase money, or other consideration, or made valuable improvements. The grounds on which such relief is granted are not because of any binding effect of the oral contract, but because the enforcement of the contract is necessary in order to prevent fraud.<sup>4</sup> But to invoke the rule with reference to option contracts, it is necessary that the

<sup>2</sup> See Sec. 1207.

This rule of part performance does not obtain in Kentucky, but the party receiving the consideration will not be allowed to rely on the statute to keep it, *Waters v. Kline*, 121 Ky. 611, 85 S. W. 209, 123 A. S. R. 215, 27 Ky. L. Rep. 479.

Option on personal property, *Walker v. Bamberger*, 17 Utah 239, 54 P. 108.

It would seem that as to the sale of personal property, the only part performance which will take the contract out of the statute is that specified in the statute, such as part payment, etc., see *Bruen v. Astor*, Anth. N. P. (N. Y.) 133.

Full performance by a broker under an oral contract to sell land does not take the contract out of the statute, *Taylor v. Peterson*, (Ore.) 147 P. 520.

<sup>3</sup> *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, but not of course, at the suit of the other party, see Sec. 417, note; *Lane v. Shackford*, 5 N. H. 130; *Burnet v. Blackmar*, 43 Ga. 569; *Rathbun v. Rathbun*, (N. Y.) 6 Barb. 98.

<sup>4</sup> *Calanchini v. Branstetter*, 84 Cal. 249, 24 P. 149, division line, option to purchase on either side as established.

*Wall v. Minneapolis etc. Ry. Co.*, 86 Wis. 48, 56 N. W. 367, part performance and change of situation of parties distinguished.

*Abbott v. 76 Land Co.*, 101 Cal. 567, 36 P. 1, possession referred to lease and not to oral option.

*Popp v. Swanke*, 68 Wis. 364, 31 N. W. 916.

optionee has timely and properly elected.<sup>5</sup> There is another rule to the effect that full and complete performance by one of the parties takes the contract out of the statute, and it would seem that this is true both at law and in equity.<sup>6</sup> Thus, a contract to repurchase shares of stock in a corporation on the happening of a certain event, when fully performed by one of the parties, is not within the statute.<sup>7</sup> The subject of this section is further presented in the chapter on specific performance.<sup>8</sup>

SEC. 419. PLEADING.—The rules with reference to pleading contracts falling within the Statute of Frauds, may be generalized by saying that as against a demurrer it is not necessary to allege the contract is in writing, except in those jurisdictions where by force of statute, or otherwise, a different rule obtains.<sup>1</sup> The same rule applies to

<sup>5</sup> *Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67.

<sup>6</sup> *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586, but the right of recovery at law is upon a promise implied by law to pay the value of the property received or the value of the services rendered.

<sup>7</sup> *Fremont C. Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Fay v. Wheeler*, 44 Vt. 292 repurchase.

<sup>8</sup> See Sec. 1207.

<sup>1</sup> It is not necessary to allege the contract is in writing; to meet the requirements of the Statute of Frauds the Court will so assume, if it does not appear from the complaint the contract is oral, *Trammell v. Craddock*, 93 Ala. 450, 9 So. 587; *Gale v. Harp*, 64 Ark. 462, 43 S. W. 144; *Vassault v. Edwards*, 43 Cal. 458; *Smith v. Taylor*, 82 Cal. 533, 123 P. 217; *Nunez v. Morgan*, 77 Cal. 427, 19 P. 753, findings; *Berry v. French*, 24 Colo. App. 519, 135 P. 985; *Dennison v. Barney*, 40 Colo. 442, 113 P. 519; *Walker v. Edmundson*, 111 Ga. 454, 36 S. E. 800, option; *Mobley v. Lott*, 127 Ga. 572, 56 S. E. 637; *Speyer v. Desjardins*, 144 Ill. 641, 32 N. E. 283; *Kroll v. Diamond Match Co.*, 106 Mich. 127, 63 N. W. 983, oral election;

pleading the authority of an agent.<sup>2</sup> It would seem, however, that where plaintiff relies on an oral contract and part performance to avoid the statute, the facts relied on as part performance must be alleged.<sup>3</sup>

The same rules apply to answers setting up such a contract.<sup>4</sup> Of course, if it appears from the face of the pleading that the contract is oral, and no

*Benton v. Schulte*, 31 Minn. 312, 17 N. W. 621; *Dudley v. Bachelder*, 53 Me. 403; *Mullaly v. Holden*, 123 Mass. 583; *Campbell v. Burnett*, 120 Md. 214, 87 Atl. 894; *Young Men's Christian Ass'n v. Dubach*, 82 Mo. 475; *Reed v. Crane*, 89 Mo. App. 670, option; *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 A. S. R. 270; *Mayger v. Cruse*, 5 Mont. 485, 6 P. 333.

<sup>1</sup> *Walker v. Richards*, 39 N. H. 259; *Shields v. Titus*, 46 Ohio St. 528, 22 N. E. 717; *Russell v. Swift*, 5 Ore. 233; *Cranston v. Smith*, 6 R. I. 231; *Robbins v. Deverill*, 20 Wis. 142; *Pettit v. Hamlyn*, 43 Wis. 314; *Dennison v. Barney*, 40 Colo. 442, 113 P. 519.

The reason of the rule is that the statute of frauds merely introduces a new rule of evidence, but does not alter or affect the rule of pleading, *Whitehead v. Burgess*, 61 N. J. L. 75, 38 Atl. 802.

Where an issue is made plaintiff must prove the contract is in writing, *Vassault v. Edwards*, 43 Cal. 458.

In some jurisdictions it is held it will be presumed the contract is oral if there is no averment it is in writing, *Percifield v. Black*, 132 Ind. 384, 31 N. E. 955; *Horner v. McConnell*, 158 Ind. 280, 63 N. E. 472; also *Morgan v. Wickliffe*, 110 Ky. 215, 61 S. W. 13, 22 Ky. L. Rep. 1648; *Boone v. Coe*, 153 Ky. 233, 154 S. W. 900; *Babeock v. Meek*, 45 Iowa 137.

Pleading oral option as a circumstance to show fraud is permissible, *McNaughton v. Smith*, 136 Mich. 368, 99 N. W. 382.

<sup>2</sup> *Fowler v. Fowler*, 204 Ill. 82, 68 N. E. 414.

<sup>3</sup> See note 5, *infra*; *Powder River etc. Co. v. Lamb*, 38 Neb. 339, 56 N. W. 1019.

<sup>4</sup> *Bradford Inv. Co. v. Joost*, 117 Cal. 204, 48 P. 1083; *Walker v. Edmundson*, 111 Ga. 454, 36 S. E. 800.

facts are alleged to take the case out of the statute, it is demurrable.<sup>5</sup>

Whether or not it is necessary expressly to plead the statute as a defense in an answer is involved in some conflict of judicial decision. The general rule is the defense is waived if the statute is not pleaded.<sup>6</sup> This is undoubtedly true in all cases where the complaint expressly sets up an oral contract,<sup>7</sup> or declares on the contract in general terms, the execution of which is not denied.<sup>8</sup> If, however, the defendant denies the execution, and thus puts

<sup>5</sup> *Alexander v. Cleland*, 13 N. Mex. 524, 86 P. 425; see *Thompson v. New So. Coal Co.*, 135 Ala. 630, 34 So. 31, 62 L. R. A. 551, 93 A. S. R. 49; *Arguello v. Edinger*, 10 Cal. 150; *Dicken v. McKinlay*, 163 Ill. 318, 45 N. E. 134, 54 A. S. R. 471; *Horner v. McConnell*, 158 Ind. 280, 63 N. E. 472; *Linn etc. Co. v. Terrill*, 76 Ky. (13 Bush.) 463; *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449; *Peckham v. Balch*, 49 Mich. 179, 13 N. W. 506, part performance; *Wentworth v. Wentworth*, 2 Minn. 277, 72 Am. Dec. 97; *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823, under general denial; *Wirtz v. Guthrie*, 81 N. J. Eq. 271, 87 Atl. 134; *Stovall v. Gardner*, 100 Tex. 25, 94 S. W. 218; *Goodrich v. Rogers*, 75 Wash. 212, 134 P. 947.

<sup>6</sup> See *Hemmings v. Doss*, 125 N. C. 400, 34 S. E. 511, a parol agreement within the statute is neither illegal nor void, hence the theory of waiver if not pleaded.

*Alaska S. Co. v. Standard Box Co.*, 158 Cal. 567, 112 P. 454; *Dennison v. Barney*, 40 Colo. 442, 113 P. 519; *Bailey v. Henry*, 125 Tenn. 390, 143 S. W. 1124; *Cunningham v. Blanchard*, 85 Vt. 494, 83 Atl. 469; *Mitchell v. Henderson*, 37 Mont. 515, 97 P. 942; *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911.

<sup>7</sup> *Goodrich v. Rogers*, 75 Wash. 212, 134 P. 947; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220, option; *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978; *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911, 912; *Gachet v. Morton*, 181 Ala. 179, 61 So. 817; see *Taylor v. Merrill*, 55 Ill. 52; *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404.

<sup>8</sup> *Hewitt v. Lehigh & H. Ry. Co.*, 57 N. J. Eq. 511, 42 Atl. 325; *Matthes v. Wier*, (Del. Ch.) 84 Atl. 878; *Christiansen v. Aldrich*, 30 Mont. 446, 76 P. 1007; *Abba v. Smyth*, 21 Utah 109, 59 P. 756; *Atkinson v. Washington & Jefferson College*, 54 W. Va. 32, 46 S. E. 253; *Goodrich v. Rogers*, 75 Wash. 212, 134 P. 947; *Barrett v. McAllister*, *supra*; *Keller v. Fitzgerrell*, 249 Ill. 451, 94 N. E. 926, affirming 158 Ill. App. 534.

plaintiff upon his proof, the weight of authority is that the issue is raised and that the defendant is placed in a position to interpose objection in accordance with the practice of the particular jurisdiction.<sup>9</sup>

<sup>9</sup> The decisions of the particular jurisdiction must be consulted to ascertain the qualification of the general rule that the defendant may rely on the general issue, or a general denial.

See the leading case of *Feeney v. Howard*, 79 Cal. 525, 21 P. 984, 4 L. R. A. 826, 12 A. S. R. 162, and *Goodrich v. Rogers*, 75 Wash. 212, 134 P. 947; *Hamilton v. Thirston*, 93 Md. 213, 48 Atl. 709; *Mitchell v. Henderson*, 37 Mont. 515, 97 P. 942; *Vassault v. Edwards*, 43 Cal. 458; *Powder River etc. Co. v. Lamb*, 38 Neb. 339, 56 N. W. 1019.

See, however, *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911; *Matthews v. Matthews*, 154 N. Y. 288, 48 N. E. 531. These decisions hold that when the complaint does not disclose whether the contract is oral or written, it is necessary for the defendant to plead the statute in order to avail himself of the defense, following the rule of the English Judicature Act providing that "when a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise."

Denial of the promise is sufficient without alleging the statute, *Bean v. Lamprey*, 82 Minn. 320, 84 N. W. 1016; *Dennison v. Barney*, 40 Colo. 442, 113 P. 519.

When common counts are used in the complaint it is not necessary specifically to plead the statute as a defense, *Schotte v. Puscheck*, 79 Ill. App. 31; *Harris v. Frank*, 81 Cal. 280, 22 P. 856; *Anderson v. Dailey*, 25 Colo. App. 175, 136 P. 461.

Of course, if the statute declares the oral contract void and not merely invalid, it would seem no allegation on the part of the defendant would be necessary, *Popp v. Swank*, 68 Wis. 364, 31 N. W. 916.

Benefit of statute is waived by failure to object to the admission of parol evidence to prove the parol contract, *Nunez v. Morgan*, 77 Cal. 427, 19 P. 753.





## CHAPTER V.

### NATURE OF RIGHT OR ESTATE IN PROPERTY UNDER OPTION.

- Sec. 501. Generally.
- Sec. 502. Decisions holding optionee has no interest or estate in the property, prior to election.
- Sec. 503. Decisions holding optionee has equitable estate prior to election, *Kerr v. Day*.
- Sec. 504. *Kerr v. Day*, continued.
- Sec. 505. Same. *Telford v. Frost*.
- Sec. 506. Same. Other miscellaneous cases.
- Sec. 507. Sale and return. Sale on trial or approval. Bailment. Generally.
- Sec. 508. Same. Miscellaneous cases.
- Sec. 509. Judgments. Executions. Liens. Etc.
- Sec. 510. Mortgages.
- Sec. 511. Insurable interest in optioned property.
- Sec. 512. Right to insurance moneys.
- Sec. 513. Possession.
- Sec. 514. Upon exercise of option to purchase equitable title vests in optionee.
- Sec. 515. Bona fide purchasers of option property. Notice.
- Sec. 516. Rights under junior and senior options.
- Sec. 517. Equitable conversion.
- Sec. 518. Dividends on corporate stock.
- Sec. 519. Rents.
- Sec. 520. Right to coal mined. Profits made, etc.

SECTION 501. GENERALLY.—On this subject one line of decisions (the weight of authority) holds that an option contract to purchase does not vest any estate, legal or equitable, in the optionee prior to his election to purchase. This, it is said, results from the nature of the option contract in that thereby the optionor does not sell the property, nor does he thereby agree to do so, but sells to the other party the right merely of an election to buy,<sup>1</sup> and, therefore, the rule that a vendor, under an agreement of sale, holds the title in trust for the vendee, and that the vendee holds the purchase money in trust for vendor, does not apply to option contracts.<sup>2</sup>

There is another line of decisions which seems to hold to the contrary, but it occurs to us the well considered of these decisions hold merely that

<sup>1</sup> *Benedict v. Pincus*, 191 N. Y. 377, 84 N. E. 284; *Cameron v. Shumway*, 149 Mich. 634, 113 N. W. 287; *Hamburger v. Thomas*, (Tex. Civ. App.) 118 S. W. 770.

See decisions cited under Sec. 502, *infra*.

While the option, prior to election, does not vest any property rights in the optionee, still the option contract itself is property within the purview of the law, *Haskins v. Ryan*, 75 N. J. Eq. 330, 78 Atl. 566.

Prior to election, the relation of debtor and creditor does not exist as between the optionor and the optionee; therefore, the rule as to application of payments does not apply, *Harrison v. Woodward*, 11 Cal. App. 15, 103 P. 933.

Nor is the option a "debt" within constitutional inhibition against incurring debts, *Overall v. Madisonville*, 125 Ky. 684, 102 S. W. 278, 31 Ky. L. Rep. 278, 12 L. R. A. (N. S.) 433; *Perrigo v. City of Milwaukee*, 92 Wis. 236, 65 N. W. 1025.

<sup>2</sup> *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853, shares of stock, holding only effect of option on absolute ownership of property is on right of optionor during time limit to sell the property; also *Thacher v. Weston*, 197 Mass. 143, 83 N. E. 360.

when the option is supported by a consideration, the optionee acquires a right, by timely election, to enforce a conveyance of the property as against a purchaser or encumbrancer with notice.<sup>3</sup>

However, there might be a case where a transaction taking on the form of the option, is such as to vest in the optionee an equitable right or estate in the property.<sup>4</sup>

SEC. 502. DECISIONS HOLDING OPTIONEE HAS NO INTEREST OR ESTATE IN THE PROPERTY PRIOR TO ELECTION.

—An option was given to purchase an undivided one-half interest in certain lands, at a certain price, and within a certain fixed time. No payment of the price for the land, or any election, was made by the optionee. The court said: “The contract of itself did not vest him (optionee) with any interest or estate in the land. It merely pointed out the mode by which he might acquire an interest,

<sup>3</sup> See *Crowley v. Byrne*, 71 Wash. 444, 129 P. 113; *Copple v. Aigeltinger*, 167 Cal. 706, 140 P. 1073; *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150.

<sup>4</sup> Thus, as said in *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426, 430, there may be instances in which the consideration to support the option is so grossly in excess of its value that a court would construe the contract as showing an intention of the parties to accord to the purchaser a present right in the subject matter. This was said in discussing the rule of forfeiture of payments made. See *Ely v. Beaumont*, 5 S. & R. (Pa.) 124; also note 4, Sec. 862; *McGregor v. Ireland*, 86 Kan. 426, 121 P. 358.

See assignments, Secs. 602, 603; equitable conversion, Sec. 517.

namely: By paying a certain sum of money within a certain time."<sup>1</sup>

No interest in the land is acquired until the optionee exercises his right to purchase, and a provision that the option shall be a covenant running with the land does not alter the rule.<sup>2</sup>

An option in a lease does not vest any title, or interest, in the optionee except that acquired under the lease as lessee until acceptance and tender.<sup>3</sup>

Other decisions holding that no estate or interest in the land, legal or equitable, passes to the optionee prior to his election, will be found collected in the note.<sup>4</sup> And this seems to be the rule

<sup>1</sup> *Richardson v. Hardwick*, 106 U. S. 252, 27 L. Ed. 145, 1 S. Ct. 213; also *Stevens v. McChrystal*, 150 Fed. 85, mining claim; see *Benedict v. Pincus*, 191 N. Y. 377, 84 N. E. 284, agreement for lease; *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426, 430, mine; *Woodall v. Bruen*, (W. Va.) 85 S. E. 170.

<sup>2</sup> *Kadish v. Lyon*, 229 Ill. 35, 82 N. E. 194.

<sup>3</sup> *Bras v. Sheffield*, 49 Kan. 702, 31 P. 306, 33 A. S. R. 386; *Powell v. Eckler*, 96 Mich. 538, 56 N. W. 1, lease and option to purchase piano; *Luigart v. Lexington Turf Club*, 130 Ky. 473, 113 S. W. 814, lease and option; *Chandler & Co. v. McDonald*, 215 Mass. 365, 102 N. E. 319, an option to buy if optionor decided to sell; *Young v. Matthew Turner Co.*, 168 Cal. 671, 143 P. 1029, option to repurchase interest in vessel does not give optionee right to maintain replevin.

<sup>4</sup> *Thacher v. Weston*, 197 Mass. 143, 83 N. E. 360; *Cameron v. Shumway*, 149 Mich. 634, 113 N. W. 287, not even a chose in action; *Womack v. Coleman*, 92 Minn. 328, 100 N. W. 9, conveys no title but creates rights *in personam*; *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853, shares of stock; *Dunnaway v. Day*, 163 Mo. 415, 63 S. W. 731; *Verstine v. Yeaney*, 210 Pa. 109, 59 Atl. 689; *National Oil etc. Co. v. Teel*, 95 Tex. 586, 68 S. W. 979, affirming 67 S. W. 545; *Tibbs v. Zirkel*, 55 W. Va. 49, 46 S. E. 701, 104 A. S. R. 977, 2 Ann. Cas. 421; *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150;

notwithstanding the optionee is given possession and makes improvements, but fails to elect.<sup>5</sup>

And is also the rule with reference to alternative stipulations in contracts. Thus, where the lessor of a brick yard leased the same reserving as rent a certain sum on every 1000 bricks manufactured by the lessee, and the lease giving him the option, from time to time, to take, at the kiln, at the market price, such quantity of bricks as should be equivalent to the sum named as rent, the lessor had no property in the bricks till he made his election.<sup>6</sup>

Nelson v. Stephens, 107 Wis. 136, 82 N. W. 163; Gustin v. School Dist., 94 Mich. 502, 54 N. W. 156, 34 A. S. R. 361; Newton v. Newton, 11 R. I. 390, 23 Am. Rep. 476; Olds v. Little Horse Creek Cattle Co., 22 Wyo. 336, 140 P. 1004; Perrigo v. City of Milwaukee, 92 Wis. 236, 65 N. W. 1025; Rampton v. Dobson, 156 Iowa 315, 136 N. W. 682; Sheilds Bros., In re 134 Iowa 559, 111 N. W. 963, 10 L. R. A. (N. S.) 1061; Sprague v. Schotte, 48 Ore. 609, 87 P. 1046; Stembridge v. Stembridge, 87 Ky. 91, 7 S. W. 611, 9 Ky. L. Rep. 948; Little v. Cardwell, (Ky.) 122 S. W. 799.

<sup>4</sup> Attempt to get option is not an "attempt to purchase" within condemnation statute of Michigan, Mich. Cent. R. Co. v. Ferguson, 162 Mich. 220, 127 N. W. 320.

Lien to optionor on oil produced, Willetts v. Reid, 5 N. Y. St. 175.

Montgomery v. Hundley, 205 Mo. 138, 103 S. W. 527, option on stock; optionee owner within rule that agent can not buy from himself.

Krhut v. Phares, 80 Kan. 515, 103 P. 117, agent can not refuse to account to principal for profits of transaction on ground that principal has no estate or interest in land.

Where the beneficiary under a trust deed of land joined in the contract authorizing the trustee to convey and after conveyance gave an option to purchase his interest, the optionee has no interest in the lands, Jackson v. Jackson, 175 Fed. 710, 99 C. C. A. 286.

<sup>5</sup> Bostwick v. Hess, 80 Ill. 138, possession taken and improvements made.

<sup>6</sup> Appeal of Wait, 24 Mass. 100, 19 Am. Dec. 262.

SEC. 503. DECISIONS HOLDING OPTIONEE HAS EQUITABLE ESTATE PRIOR TO ELECTION. *KERR v. DAY*.<sup>1</sup>—W and A gave a lease of a lot for three years by the terms of which the lessee was given an option to purchase at any time during the term. Subsequently, W conveyed his interest in the lot to A. The lessee then assigned the option to W. A then conveyed the lot to Day. Subsequently, but after the expiration of the three years W assigned the option to T. Day

<sup>1</sup> *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526.

*House v. Jackson*, 24 Ore. 89, 32 P. 1027, seems to hold that where there is a consideration for the option an equitable estate vests in the optionee and cites the *Kerr* decision as authority. The court confused the right of the optionee to assign his option contract with the supposed estate of the optionee in the optioned land, and seemed to think that to enable the optionee to assign it was necessary to hold that the equitable estate vested in the optionee. The court reached the right conclusion on the facts of the case, but the decision should have been put on the ground that an option supported by a consideration vests in the optionee the right of acquiring an interest in the land, and, therefore, is assignable before election, and not on the ground that an option is assignable because it vests an equitable estate to the land in the optionee. See Sec. 602; also *Crowley v. Byrne*, 71 Wash. 444, 129 P. 113, quoting *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522. The decision in the *House* case is somewhat influenced by the fact that a very large sum was paid for the option privilege, see Sec. 501, note 4; Sec. 862, note 4.

*Kerr v. Day* was followed in *People's St. Ry. Co. v. Spencer*, 156 Pa. 85, 27 Atl. 113, 36 A. S. R. 22. The latter decision cites *Frick's Appeal*, 101 Pa. 485, (holding that where the land was sold on a prior judgment the surplus moneys were the property of the optionee), and says the circumstances that, in the *Frick* case, the option had been exercised before the levy and sale was not of controlling weight, as the decision was put on the ground that "in equity the vendee becomes the owner subject to the payment of the price. His right of property therein flows from the contract and exists before any purchase money may have been paid." See Sec. 517.

brought ejectment against Kerr, a tenant in possession under Q and T, the assignee of the option.

At the trial below it appeared that at the time of the conveyance by A to Day, one Carnahan was in possession of the property as tenant of Cuddy, the original lessee, and that after the assignment of the option to W, Carnahan paid rent to W. Kerr went into possession when Carnahan left.

The trial court instructed the jury that the possession of Carnahan as tenant of Cuddy and the payment of rent to W did not amount to constructive notice of the title claimed under the option; that the agreement to give the option was a mere personal covenant and did not vest any interest, legal or equitable, in the optionee, and that the defendant T, claiming under the option alone, without any act of election previous to the sale to Day, the plaintiff below had no such title to the land as would furnish the foundation of a defense to the action of ejectment. The verdict and judgment went for plaintiff Day. This judgment was reversed on appeal, the Supreme Court holding that the lessee had an equitable estate in the land under his option to purchase, which passed by assignment to the defendant T, and that this right could be enforced against Day, the purchaser of the lot, who upon the facts was charged with notice of the option, since the possession of the subtenant was in effect the same as the possession of the lessee, and being consistent with the contract, was sufficient to give notice thereof to Day, the purchaser.

SEC. 504. KERR v. DAY, CONTINUED.—It should be observed in this case that notwithstanding the head note and the language of the opinion, it lays down the rule merely that a purchaser of land with notice of an option thereon takes the land subject to the right of the optionee to have specific performance. It should be further observed that this right arises, not from the fact that the optionee has any estate in the land, but from the fact that, by relation, his election to purchase dates back to the execution of the option contract and thus cuts out the rights of an intervening purchaser with notice. This is made clear by reference to the reasoning of the court which proceeds in analogy to the rule with reference to equitable conversion.

Another fact should be noted. The lease was executed April 1, 1845, and ran for a term of three years. The option ran for the same term. The lot was conveyed to plaintiff below (Day) August 9, 1847. Warden, who thereafter acquired the option by assignment from Cuddy, the original lessee, assigned the option to defendant T August 22, 1849, more than a year after the expiration of the leasehold term, and it does not appear from the reported case that the holder of the option, at any time during the leasehold term, exercised his right of election to purchase. Clearly, if there was no timely election the option expired by limitation April 1, 1848, and it would therefore follow that plaintiff below was entitled to judgment upon that ground.



SEC. 505. SAME. TELFORD v. FROST.<sup>1</sup>—Plaintiff and one S obtained a written option from C, on certain described land, for a certain price and for a certain time. S then in writing assigned his interest in the option to plaintiff. Plaintiff and the defendant then entered into a parol agreement with S to bring C to defendant and that defendant would enter into an agreement with C to purchase the property from C, for \$3,000 (the option price), and that in consideration of plaintiff's said services and in permitting the defendant to take the place of plaintiff in purchasing the property from C, defendant would pay plaintiff the sum of \$1,000. Suit was brought to recover the \$1,000 alleging the above facts and the carrying out and performance of the agreement. Judgment went for plaintiff for \$1,000. Defendant appealed and on appeal it was urged that the option gave plaintiff an interest in the land within the meaning of the Wisconsin statute providing that no estate or interest in lands shall be surrendered unless by act or operation of law or by deed of conveyance in writing subscribed by the party surrendering the same. The court held the acts of the parties amounted to a surrender of the option within the meaning of the statute.

In the opinion it is said the option gave plaintiff an interest in the land within the meaning of the statute. The statement, however, is a mere passing remark. However, in the later case of *Wall v. Railway Company*<sup>2</sup> the same court, referring to the *Telford* decision, says that one having an option

<sup>1</sup> *Telford v. Frost*, 76 Wis. 172, 44 N. W. 835.

<sup>2</sup> *Wall v. Minn. St. P. & S. S. Ry. Co.*, 86 Wis. 48, 56 N. W. 367.

in writing for the purchase of land has an interest therein within the meaning of the statute there referred to<sup>3</sup> as well as within the statute of frauds. In the Wall case there was an election by the optionee within the option time, and in such case the authorities all agree that thereby the optionee becomes vested with an equitable estate on the principle governing agreements of sale.<sup>4</sup>

SEC. 506. SAME. OTHER MISCELLANEOUS CASES.—An option to purchase mining lands with the privilege of prospecting for and mining ore, is a license coupled with an interest, and where a licensee under such license was given possession and made expenditures, the license is irrevocable, and he is entitled to exclusive possession during the life of the agreement, and during such time has an interest in the realty and in the ores produced.<sup>1</sup>

An agreement between a majority stockholder of a corporation and its directors whereby the stockholder conveyed to the directors as trustee for five years, the legal title and right to vote the stock, and gave the trustees the first right to purchase the stock if any party to the agreement should desire to discontinue the trust relation, at the expiration of the five year period, for double its par value, for

<sup>3</sup> The statute provided that agreements for the transfer of interest in land should not be construed to abridge the powers of courts to compel specific performance of agreements in case of part performance.

<sup>4</sup> See Sec. 514, *infra*.

<sup>1</sup> Hall v. Abraham, 44 Ore. 477, 75 P. 882; see Grobe v. Doyle, 12 Brit. Col. 191.

the benefit of the remaining parties, made the power one coupled with an interest and hence irrevocable.<sup>2</sup>

An oral agreement between the owner and the optionee in possession who had made valuable improvements, but whose option had expired, by which the owner agreed to pay commissions on sale of the optioned property, made by the optionee, is within the California Statute of Frauds requiring contracts for payment of commissions for the sale of real property to be in writing.<sup>3</sup>

An option contract on land, supported by a valuable consideration and duly acknowledged and certified, is recordable under the recording acts as a contract for an interest in land.<sup>4</sup> But it is not taxable to the vendor as an interest in the land though it is taxable as a contract, and at its valuation, but not necessarily for the purchase price remaining unpaid, since the optionee is not obligated to pay the balance of the price.<sup>5</sup> An option does not create a debt which is taxable as such against the optionor; nor is it an "effect having a market value," within the tax law.<sup>6</sup> An optionee

<sup>2</sup> Boyer v. Nesbitt, 227 Pa. 398, 76 Atl. 103.

<sup>3</sup> Crowell v. Ewing, 4 Cal. App. 358, 88 P. 285.

<sup>4</sup> Chesbrough v. Vizard Inv. Co., 156 Ky. 149, 160 S. W. 725; Stearnes v. Goad, 111 Va. 834, 69 S. E. 1101, fees fixed by value of option privilege and not by value of land; *contra* Shields Bros., In re 134 Iowa 559, 111 N. W. 963, 10 L. R. A. (N. S.) 1061; Salisbury v. LaFitte, 21 Colo. App. 13, 121 P. 952.

<sup>5</sup> McGregor v. Ireland, 86 Kan. 426, 121 P. 358; this transaction was held to be an escrow with option to elect not to complete.

<sup>6</sup> See Perrigo v. City of Milwaukee, 92 Wis. 236, 65 N. W. 1025; Shields Bros., In re, 134 Iowa 559, 111 N. W. 963, 10 L. R. A. (N. S.) 1061; see Rampton v. Dobson, 156 Iowa 315, 136 N. W. 682; Branner v. Thomas, 37 Kan. 282, 15 P. 211.

in possession is not liable for taxes under the rule that a purchaser in possession must discharge the taxes,<sup>7</sup> since the optionee is not bound to pay the purchase money prior to election.<sup>8</sup>

SEC. 507. SALE AND RETURN. SALE ON TRIAL OR APPROVAL. BAILMENT. GENERALLY.—Under the common form of option to purchase, if the optionee fails to elect within the option time, his option privilege is lost. Action on his part under the option is necessary only when he desires to turn the option into a binding promise on the part of the optionor, which he may do by election. In this form of option, the title to the property does not vest in the optionee until his election, whereupon he becomes the equitable owner.<sup>1</sup>

In transactions like sale and return, or more specifically sale with option to return, the title to the property at once vests in the purchaser and the title remains in him, unless, in accordance with the provisions of the option to return, he seasonably exercises such right and returns the property.

It will be observed that in both cases the failure of the purchaser to act at all, ends his option right,

<sup>7</sup> Olds v. Little Horse Creek Cattle Co., 22 Wyo. 336, 140 P. 1004.

<sup>8</sup> Olds v. Little Horse Creek Cattle Co., 22 Wyo. 336, 140 P. 1004.

To the point that the option is not taxable, see Schoonover v. Petcina, 126 Iowa 261, 100 N. W. 490; Cross v. Snakenberg, 126 Iowa 636, 102 N. W. 508; Tessier v. City of Nashua, 75 N. H. 572, 78 Atl. 495.

An agreement of sale obligating the purchaser to pay the price is taxable, and the change of an agreement of sale and purchase into an option for the purpose of avoiding taxation is a sham, and the agreement is subject to taxation, *Montgomery v. Marshall Co.*, 152 Iowa 161, 129 N. W. 329.

<sup>1</sup> See Secs. 501, 514.

but so far as the title to the property is concerned the effect in the one case is quite different from that in the other. In the former, that is, the common option to purchase, the optionee has lost his option right and has not acquired the property; in the latter, he retains title to the property because he has lost his option right to return the property.

The decisions about to be presented and reviewed show the three classes of transactions above mentioned. It will be convenient to note here that, depending upon the intention of the parties as gathered from the contract and the surrounding circumstances, under a sale with option to return, the title to the property vests in the buyer and re-vests in the seller only in the event the option right to return is exercised. In other words, this kind of transaction is a sale defeasible on the fulfillment of a condition subsequent.<sup>2</sup>

In a sale on trial or approval, there is no sale until the buyer, in the exercise of the right so to do, converts the transaction into a sale. The latter is for all practical purposes a bailment of the property with the privilege of purchase on the part of the bailee if he is satisfied with it and desires and elects to purchase.<sup>3</sup>

<sup>2</sup> Allen, *In re* 183 Fed. 172; *Guss v. Nelson*, 200 U. S. 298, 50 L. Ed. 489, 26 S. Ct. 260.

<sup>3</sup> *O'Donnell v. Wing & Son*, 121 Ga. 717, 49 S. E. 720; *Gottlieb v. Rinaldo*, 78 Ark. 123, 93 S. W. 750, 6 L. R. A. (N. S.) 273; *Hart v. Carpenter*, 24 Conn. 427; *Sargent v. Gile*, 8 N. H. 325; *Deering v. Austin*, 34 Vt. 330; *Rumpf v. Barto*, 10 Wash. 382, 38 P. 1129, jewelry; *Kahn v. Klabunde*, 50 Wis. 235, 6 N. W. 888; *Wiggins v. Tumlin*, 96 Ga. 753, 23 S. E. 75; *State v. Betz*, 207 Mo. 589, 106 S. W. 64; *Glasecock v. Hazell*, 109 N. C. 145, 13 S. E. 789.

14—Option Contracts.

## SEC. 508. SAME. MISCELLANEOUS CASES.

—A contract of sale and return exists where the privilege of purchasing or returning is not dependent on the character or quality of the property sold, but rests entirely upon the option of the purchaser to return or retain, in which case the title vests in the purchaser subject to his option to return the property.<sup>1</sup>

Under an option to return a purchase if the purchaser does not approve, the title vests in the purchaser, subject to the right to rescind and return; under an option to purchase if the purchaser does approve, the title does not pass until the option to buy is exercised.<sup>2</sup>

The title to rings does not pass to the purchaser where they are sent to her under an agreement that she could keep the rings and account to the seller for their specified value if she was pleased with them, otherwise that she should return them to the seller within a reasonable time.<sup>3</sup> Nor, to a machine delivered to a prospective purchaser under an agreement to purchase "if satisfied";<sup>4</sup> nor, under a lease of a machine with option to purchase<sup>5</sup> unless

<sup>1</sup> *Sturm v. Boker*, 150 U. S. 312, 37 L. Ed. 1093, 14 S. Ct. 99; *Haskins v. Dern*, 19 Utah 89, 56 P. 953.

<sup>2</sup> *Steinhauer v. Henson*, 54 Colo. 246, 131 P. 255; citing *Hunt v. Wyman*, 100 Mass. 198, an option to purchase "if liked"; also *W. Irving S. Bros. v. Herold*, 81 Mo. App. 461; *Wiggins v. Tumlin*, 96 Ga. 753, 23 S. E. 75.

<sup>3</sup> *Gottlieb v. Rinaldo*, 78 Ark. 123, 93 S. W. 750, 6 L. R. A. (N. S.) 273; *Colton v. Wise*, 7 Ill. App. 395.

<sup>4</sup> *James Smith Woolen Mach. Co. v. Holden*, 73 Vt. 396, 51 Atl. 2.

<sup>5</sup> *Standard S. M. Co. v. Frame*, 2 Pennewill, (Del.) 430, 48 Atl. 188; *Wheeler & W. Mfg. Co. v. Heil*, 115 Pa. 487, 8 Atl. 616, 2 A. S. R. 575.

it appears that it was the intention of the parties to transfer the title.<sup>6</sup>

Under a contract by which one agrees to send goods to another for the latter to sell or return, the title passes and the goods are the property of the latter until he exercises his option to return; if the agreement was that there should be no sale but the receiver of the goods was to sell them and account to the sender for the proceeds, the receiver does not acquire title and he is a mere bailee and, consequently, in the latter case, the goods are not subject to a mortgage of the receiver.<sup>7</sup>

Where the identical thing delivered is to be restored though in an altered form, the contract is one of bailment, and the title to the property is not changed; but where there is no obligation to restore the specified article, and the receiver is at liberty to return another thing of equal value, he becomes the debtor to make such return and the title is changed.<sup>8</sup>

When a party buys cattle and has the bill of sale made out in his own name, and leases the cattle to another at a certain rent, with the understanding that the lessee may purchase the same at any time during the hiring, at a certain price, by paying the difference between the rent paid and the price, title

<sup>6</sup> Scott M. & S. Co. v. Shultz & Clary, 67 Kan. 605, 73 P. 903.

<sup>7</sup> Furst Bros. v. Com. Bank of Augusta, 117 Ga. 472, 43 S. E. 728; see William Frantz & Co. v. Fink, 125 La. 1013, 52 So. 131; Hudson v. Seeley Specialties Co., 19 Cal. App. 213, 124 P. 1051; In re Miller & Brown, 135 Fed. 868; Curtin v. Ingle, 143 Cal. 354, 77 P. 74; also McKenzie v. Roper Wholesale Grocery Co., 9 Ga. App. 185, 70 S. E. 981.

<sup>8</sup> Fleet v. Hertz, 201 Ill. 594, 66 N. E. 858, 94 A. S. R. 192; Rehder's Adm'r v. Clem, 86 Va. 374, 10 S. E. 504.

meantime to remain in the vendor, the transaction is valid as a lease with privilege to purchase and the cattle are not liable for the debts of the lessee.<sup>9</sup>

SEC. 509. JUDGMENTS, EXECUTIONS, LIENS, ETC.—In accordance with the general rule that an option contract does not vest any interest or estate in the optionee prior to the exercise of the right of election, the courts hold that an optionee has no estate or interest in the property optioned upon which a judgment lien will attach, or upon which an execution can be levied. Thus, in a lease with option to purchase where the lessee had made one payment under the option and then defaulted, the sheriff's vendee took no title under levy and sale as property of the lessee.<sup>1</sup> On the other hand, the interest of the optionor in the land prior to election is subject to levy and sale.<sup>2</sup>

A judgment creditor can not maintain a suit in equity to establish the lien of his judgment upon land in the possession of a judgment debtor, under a lease for a term of years with option to purchase, as no lien can attach upon the mere option of the debtor.<sup>3</sup> But where the lessee, under a lease giving him the right to make improvements and also

<sup>9</sup> *Miles v. Edsall*, 7 Mont. 185, 14 P. 701; also *Evans v. Napier*, 111 Ga. 102, 36 S. E. 426.

<sup>1</sup> *Christie's Appeal*, 85 Pa. St. 463; see *Provident Life etc. Co. v. Mills*, 91 Fed. 435.

Bailment with option to purchase, *Bjork v. Bean*, 56 Minn. 244, 57 N. W. 657; also *McClelland v. Scroggin*, 35 Neb. 536, 53 N. W. 469.

<sup>2</sup> *Sheeby v. Scott*, 128 Iowa 551, 104 N. W. 1139, 4 L. R. A. (N. S.) 365.

<sup>3</sup> *Sweezy v. Jones*, 65 Iowa 272, 21 N. W. 603; *Bras v. Sheffield*, 49 Kan. 702, 31 P. 306, 33 A. S. R. 386.



giving the lessor an option to purchase the same, makes improvements, his interest is bound by a judgment against him.<sup>4</sup>

Where an assignee of an unrecorded option for the purchase of real estate, assigned the option prior to the issuance of an execution and a judgment against him, he has no title, and a levy and sale of the property under the execution, conveyed no title to the purchaser.<sup>5</sup>

An optionee who enters into possession and works the mining property, and employs laborers to perform such work, is neither a vendee nor the agent of the optionor-owner under the lien law, and such work establishes no indebtedness against the optionor, and fastens no lien against the estate of the optionor in the property.<sup>6</sup>

In California it is held that where the lease-option contemplates the working of the mine with a view of developing it, and the lessee takes possession, develops the same and employs laborers for the purpose, he is the statutory agent of the lessors, and the laborers are entitled to liens against the

<sup>4</sup> *Ely v. Beaumont*, 5 S. & R. (Pa.) 124, election had been made.

<sup>5</sup> *Salisbury v. LaFitte*, 21 Colo. App. 13, 121 P. 952.

<sup>6</sup> *Harper v. Independent Dev. Co.*, 13 Ariz. 176, 108 P. 701; also *Williams v. Eldora M. Co.*, 35 Colo. 127, 83 P. 780; *Milwaukee Gold M. Co. v. Tomkins-Cristy Hardware Co.*, 26 Colo. App. 155, 141 P. 527; see *Luigart v. Lexington Turf Club*, 130 Ky. 473, 113 S. W. 814.

The amendment of 1912 to Arizona statute giving employee of purchaser of mining property a lien for labor cannot be given a retroactive operation and therefore does not apply to an owner who gave an option prior to the amendment, *Oceanic G. M. Co. v. Steinfeld*, 16 Ariz. 571, 147 P. 717.

property for their work,<sup>7</sup> unless the lien claimants know of the status of the lessee and his interest under the contract, and with such knowledge, work for the lessee as principal and look to him for their wages, in which case the lien-claimants would not be entitled to a lien for their work.<sup>8</sup>

SEC. 510. MORTGAGES.—Where a person leases land for a definite period and has a clause in the lease giving him the right to purchase the property, at any time before the expiration of the lease, the interest acquired under it may be mortgaged, under the Kentucky statute, which provides that “any interest in or claim to real estate may be disposed of by deed or will in writing.”<sup>1</sup>

A mortgage of a leasehold estate of a lessee upon whom the lease confers the privilege of purchasing the premises partly on credit, at a price named, at any time during the term, does not convey to the mortgagee the right to sell such option privilege of purchase.<sup>2</sup>

<sup>7</sup> *McClung v. Paradise G. M. Co.*, 164 Cal. 517, 129 P. 774; this was under the provisions of the California lien law requiring the owner (not the contractor) to post notice of non-responsibility, in order to prevent liens from attaching to his estate in the land.

<sup>8</sup> *Street v. Hazzard*, (Cal. App.) 149 P. 770.

<sup>1</sup> *Bank of Louisville v. Baumiester*, 87 Ky. 6, 7 S. W. 170, 9 Ky. L. Rep. 845; in this case it appeared the lessor assented to the mortgage by making himself a party to it. This case also holds that the mortgage on the option right (a warehouse having been erected) was prior to second mortgage by optionor given after he had obtained a deed.

See *McCauley v. Coe*, 150 Ill. 311, 37 N. E. 232, mortgage as cloud on title.

<sup>2</sup> *Menger v. Ward*, 87 Tex. 622, 30 S. W. 853; this was placed on the ground that a credit was given to the optionee and, therefore, the option was personal to him and could not be assigned.

M, in building a house, by mistake, built part of it on land of an adjoining owner, B. B gave M an option on the 25 feet of his lot covered by the house, for \$250 for six months from date, and M by endorsement accepted the offer. M then replatted and filed a map of the land, including the 25 feet, and gave a mortgage thereon to the O. S. Company, which was recorded. B's offer to M was not acted on within the six months, and afterward, B sold the 25 feet to M for \$400, \$100 cash and \$300 by mortgage taken by B's daughter. The O. S. Company subsequently sold under its power of sale in the mortgage. In an action by B's daughter to release the first mortgage, it was held that M, not having completed or acted upon his option within the six months, it was at an end, but that the O. S. Company, by the sale, was the owner of the land including the 25 feet subject to the \$300 mortgage to B's daughter which was held to be a first lien on the land.<sup>3</sup>

<sup>2</sup> Mortgage of lands by one holding under a lease for a year, with option of purchasing the land, does not pass the option right to the mortgagee, *Conn v. Tonner*, 86 Iowa 577, 53 N. W. 320.

See *Halsted's Ex. v. Colvin*, 51 N. J. Eq. 387, 26 Atl. 928, where priority of mortgage on option privilege was claimed, but where neither the mortgagor nor mortgagee paid the option price, the court saying that where the mortgage covers a mere privilege to buy, subject to a condition that a specific sum of money shall be paid as purchase money, and the mortgagor-optionee fails to perform the condition, it follows that when the land is, by force of judicial decree of the court, conveyed to and paid for by some person other than the mortgagor-optionee, the privilege mortgaged becomes extinct.

<sup>3</sup> *Nevitt v. McMurray*, 14 Ont. App. 126.

**SEC. 511. INSURABLE INTEREST IN OPTIONED PROPERTY.**—The interest of the owner of property which another holds under his option to purchase, which is irrevocable by the owner, but which the optionee has not bound himself to accept, and which he is free to abandon, is the sole and unconditional ownership of the property within the meaning of a sole and unconditional ownership clause in an insurance policy, because the owner can not compel the optionee to take the property or suffer the loss.<sup>1</sup>

A mere option contract for the sale of insured property under which nothing has been done before the loss, is not within a condition in a policy of insurance against change of title.<sup>2</sup>

A lessee with option to purchase land on which a building owned by him is situated, has not the fee simple title to the land within the Oregon statute, providing that fire policies shall be void, if the interest of the insured be other than the unconditional and sole ownership.<sup>3</sup>

The interest of a purchaser of lumber under an option, who has paid the optionor \$2,000 in cash, under an agreement with the optionor to insure the lumber and assign the policy to the optionee, is

<sup>1</sup> *Phenix Ins. Co. v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; *Milwaukee Mech. Ins. Co. v. Rhea*, 123 Fed. 9, 60 C. C. A. 103, vendee in possession and obligated to buy; *Brickell v. Atlas Assur. Co.*, 10 Cal. App. 17, 101 P. 16, sale and not option; see next section.

<sup>2</sup> *House v. Security Fire Ins. Co.*, 145 Iowa 462, 121 N. W. 509; also *Pringle v. Ins. Co.*, 107 Iowa 742, 77 N. W. 521; *Wunderlich v. Palatine F. Ins. Co.*, 104 Wis. 395, 80 N. W. 471.

<sup>3</sup> *Finlon v. National Union Fire Ins. Co.*, 65 Ore. 493, 132 P. 712; see *Mers v. Franklin Ins. Co.*, 68 Mo. 127.

the amount of money paid under the option, and not the difference between the market value of the lumber sold and the unpaid portion of the option price.<sup>4</sup>

### SEC. 512. RIGHT TO INSURANCE MONEYS.

—Prior to election to purchase by the optionee, the title to the property remains in the optionor and, of course, the optionor has an insurable interest in the property, and the optionee has not. A policy of insurance being a personal contract between the insurer and the insured, and the optionor, prior to election, being the only person having an insurable interest in the property, it follows that in the absence of a contract between the optionee and optionor, the insurance moneys under a policy taken out by the optionor, in case of loss or damage to the property, belong to him absolutely.

The optionee, therefore, is entitled to the insurance money in two cases. First, where he takes out the insurance in his own name, and for his own benefit, to cover his interest upon election to purchase, and, secondly, when by virtue of the contract with the optionor, he becomes entitled to the whole or some part of the insurance money payable to the optionor.<sup>1</sup>

Thus, under the terms of a lease with option to purchase at a fixed sum, the landlord covenanted to insure the premises. Before the time for exercising the option, the buildings on the premises burned and the landlord received the insurance money.

<sup>4</sup> *Wunderlich v. Palatine Fire Ins. Co.*, 104 Wis. 395, 80 N. W. 471.

<sup>1</sup> See *Gilbert v. Port*, 28 Ohio St. 276.

The tenant after the fire, exercised his option to purchase and claimed the insurance money as part of his purchase price. The claim was disallowed.<sup>2</sup>

When, however, the tenant of the premises, under a lease and option to purchase, is bound to insure, and does insure, and the premises are damaged by fire before his election to purchase, he is entitled to have the insurance money applied on the purchase price.<sup>3</sup> So, where the lessee insuring in the name of the lessor in an amount agreed on by them, and a loss occurring, the lessor received the insurance money and expended part of it in restoring the premises, it was held the lessee, on subsequently

<sup>2</sup> *Edwards v. West*, 7 Ch. Div. 858, 47 L. J. Ch. 463, 38 L. T. Rep. (N. S.) 481, 26 Wkly. Rep. 507, on the theory that the election did not relate back to the execution of the option; *Lawes v. Bennett*, 1 Cox 167, 29 Eng. Reprint 1111, not followed.

Also *Caldwell v. Frazier*, 65 Kan. 24, 68 P. 1076, holding equity will not decree specific performance with buildings restored or abate the price.

<sup>3</sup> *Reynard v. Arnold*, L. R. 10 Ch. 386, 23 Wkly. Rep. 804; in this case the landlord also took out a policy in another company. The two companies apportioned the amount of loss between the two policies. The court applied the whole amount; distinguished in *Edwards v. West*, *supra*.

*People's St. Ry. Co. v. Spencer*, 156 Pa. 85, 27 Atl. 113, 36 A. S. R. 22, holding election after fire related back to the beginning of the transaction and entitled optionee to insurance money.

Court refused to apply insurance moneys, where optionee was in default in payment of rent under lease (with option to purchase), to the rent in default and purchase price, *Gilbert v. Port*, 28 Ohio St. 276, but was applied on price under escrow option, distinguishing *Gilbert v. Port*, *supra*; *Kaufman v. All Persons*, 16 Cal. App. 388, 117 P. 586.

In the later case of *Smith v. Loewenstein*, 50 Ohio St. 346, 34 N. E. 159, 161, it is said that *Gilbert v. Port*, *supra*, did not hold the rule applied "to optional contracts as well as to those absolute."

An election to purchase on condition insurance moneys are applied to benefit of optionee is bad, *Clark v. Burr*, 85 Wis. 649, 55 N. W. 401.

exercising his option to purchase, was entitled to have the balance of the insurance money in the lessor's hands credited as payment on the price.<sup>4</sup>

SEC. 513. POSSESSION.—The optionee is not entitled to possession of the property in the absence of an express stipulation to that effect until he becomes entitled to a deed of conveyance.<sup>1</sup> Nor, does the fact that the optionee takes possession give him any estate in the land. Such possession is, at most, a mere license, until the optionee performs the option contract.<sup>2</sup> And it seems that the making of improvements by the optionee,<sup>3</sup> or remaining in possession after the expiration of the tenancy,<sup>4</sup> does not change the rule.

If the option gives the optionee the right of possession and also grants to him certain rights with reference to the use of the lands, his interest or estate, will, of course, depend upon the terms of the option. For instance, an option to purchase mining land with the privilege of prospecting for and mining ore is a license coupled with an interest, and when, under such option, the optionee goes into

<sup>4</sup> *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150, criticising *Edwards v. West*, *supra*, and *Gilbert v. Port*, *supra*.

<sup>1</sup> *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497; *Kissack v. Bourke*, 132 Ill. App. 360, extension; *City of Los Angeles v. Water Co.*, 124 Cal. 368, 57 P. 210.

<sup>2</sup> *Kingsley v. Kressly*, 60 Ore. 167, 118 P. 678, Anno. Cas. 1913E, 746. See *Mers v. Ins. Co.*, 68 Mo. 127, optionee went into possession and took a lease of the same premises.

<sup>3</sup> *Bostwick v. Hess*, 80 Ill. 138; *Henry v. Perry*, 110 Ga. 630, 36 S. E. 87, optionee in possession is trespasser and not tenant.

<sup>4</sup> *Goodman v. Spurlin*, 131 Ga. 588, 62 S. E. 1029.

possession and makes expenditures, the license becomes irrevocable during its life, and the optionee, during such time, has an interest in the realty and in the ores.<sup>5</sup>

**SEC. 514. UPON EXERCISE OF OPTION TO PURCHASE EQUITABLE TITLE VESTS IN OPTIONEE.**—We have seen that the effect of a timely exercise of the right of election by the optionee, is to convert the option contract into a binding promise on the part of the optionor to sell, and where the election meets the requirements of the Statute of Frauds, an agreement of sale and purchase is raised, an agreement which is enforceable by either party against the other. It follows, therefore, in the latter case, that when this event takes place, the optionee becomes vested with the equitable title, the rule being that the optionor holds the legal title in trust for the optionee and the optionee holds the purchase money for the

<sup>5</sup> *Hall v. Abraham*, 44 Ore. 477, 75 P. 882; see *Witherspoon v. Staley*, (Tex. Civ. App.) 156 S. W. 557; *Smith v. Jones*, 21 Utah 270, 60 P. 1104.

Optionee not entitled to retain possession as against the optionor when in default in paying installments of the price, though title of optionor is encumbered by mortgage and tax liens, *Champion G. M. Co. v. Champion Mines*, 164 Cal. 205, 128 P. 315, or where he fails to perform stipulated work on the premises, *Briles v. Paulson*, (Cal.) 149 P. 804.

*Town of Bristol v. Waterworks*, 25 R. I. 189, 55 Atl. 710, care by optionee in possession of water works after election and pending appraisal.

Right to possession of piano under lease and option to purchase as between administrator and widow of deceased optionee, *Powell v. Eckler*, 96 Mich. 538, 56 N. W. 1.



optionor; in other words, upon exercising the option, the optionee becomes the equitable owner of the land and the optionor the equitable owner of the purchase money.<sup>1</sup> And a timely election, and payment of the price where necessary, relate back to the date of the option and thus protect the optionee against subsequent purchasers of the optioned property with notice of the rights of the optionee.<sup>2</sup>

It is held by some courts that an election without payment or tender of the price is such performance as will vest the equitable title in the optionee. This is true in those cases where payment is not the election, or is not required to be made concurrently therewith.<sup>3</sup> But it is not true where payment is one of the elements of the election, as no equitable title or other interest vests in the optionee without

<sup>1</sup> *Waters v. Bew*, 52 N. J. Eq. 787, 29 Atl. 590; see *Smith v. Jones*, 21 Utah 270, 60 P. 1104; *Gustin v. School Dist.*, 94 Mich. 502, 54 N. W. 156, 34 A. S. R. 361; *Waterman v. Banks*, 144 U. S. 394, 36 L. Ed. 479, 12 S. Ct. 646; *Chas. J. Smith Co. v. Anderson*, (N. J. Eq.) 95 Atl. 358, option in lease.

<sup>2</sup> *Crowley v. Byrne*, 71 Wash. 444, 129 P. 113.

*Donnally v. Parker*, 5 W. Va. 301.

But not, of course, as against a *bona fide* purchaser from the optionor (Sec. 515), as the optionee is considered a "vendee" within the rule and is put on inquiry as to the relation of the optionor to the title, *Thompson & F. L. Co. v. Dillingham*, 223 Fed. 1000.

And it is further held that when the optionee of land had notice of a prior unrecorded deed to a third person, before he exercised his option or paid the purchase price the optionee was not a *bona fide* purchaser, *Lindley v. Blumberg*, 7 Cal. App. 140, 93 P. 894.

<sup>3</sup> See *Penn Min. Co. v. Smith*, 210 Pa. 49, 59 Atl. 316; *Penn Min. Co. v. Martin*, 210 Pa. 53, 59 Atl. 436.

Deed granting land on condition that title shall not vest unless payment of price made within certain time as cloud on title, see *Borst v. Simpson*, 90 Ala. 373, 7 So. 814.

his full performance of the conditions of the option.<sup>4</sup>

Again, it would seem that an election which does not bind the optionee to pay the price, does not have the effect to vest the equitable title in the optionee. Thus, if the election be oral and therefore one which could not be enforced at the suit of the optionor because of the Statute of Frauds, the rule would not apply because the rule is based on a contract having mutual enforceable obligations, that is, a sale and purchase as distinguished from an option.<sup>5</sup>

**SEC. 515. BONA FIDE PURCHASERS OF OPTION PROPERTY. NOTICE.**—The distinction between a “mere offer” and an option contract should be kept in mind. The option contract we are discussing is one supported by a valuable consideration, and, therefore, irrevocable by the optionor during the time limit. A mere unaccepted offer gives neither right nor estate which a purchaser is bound to notice.<sup>1</sup>

<sup>4</sup> *Flynn v. White Breast Coal Co.*, 72 Iowa 738, 32 N. W. 471, holding that coal mined between date of election and payment of price belonged to optionor.

<sup>5</sup> See *Sheeby v. Scott*, 128 Iowa 551, 104 N. W. 1139, 4 L. R. A. (N. S.) 365; *Stembridge v. Stembridge*, 87 Ky. 91, 7 S. W. 611, 9 Ky. L. Rep. 948; *Wehn v. Fall*, 55 Neb. 547, 76 N. W. 13, 70 A. S. R. 397; *Teal v. McNight*, 110 La. 256, 34 So. 434.

It is only when the party holding a contract of purchase has, by performance on his part, placed himself in a position to compel specific performance, that he holds the equitable title, *Smith v. Jones*, 21 Utah 270, 60 P. 1104.

<sup>1</sup> *Graybill v. Braugh*, 89 W. Va. 895, 17 S. E. 558, 559, 37 A. S. R. 894, 21 L. R. A. 133; see *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 115 A. S. R. 880, 5 L. R. A. (N. S.) 1194; *Sprague v. Schotte*, 48 Ore. 609, 87 P. 1046.

The optionor may withdraw the offer at any time before acceptance, and a sale of the property, or any other act showing an intention to withdraw and brought to the knowledge of the optionee is sufficient for that purpose. If, however, there has been a timely acceptance of a "mere offer," a purchaser who thereafter purchases the property with notice, takes it, subject to the rights of the optionee under his option.

And the same rule obtains where the option contract is supported by a valuable consideration. The principle runs through all of the decisions that while an option contract based upon a valuable consideration does not vest in the optionee any interest or estate in the land, or property, yet it does grant to the optionee a right which during the time limit, a court of equity will protect as against the purchaser of the optioned property with notice.<sup>2</sup> And the same rule obtains in jurisdictions where a sealed option is recognized.<sup>3</sup>

<sup>2</sup> This is in accordance with the rule that a purchaser who takes a deed with notice of an outstanding equitable right, takes it subject to such right, see *Brooks v. Wentz*, 61 N. J. Eq. 474, 49 Atl. 147; *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; *Boyd v. Brinckin*, 55 Cal. 427; *Copple v. Aigeltinger*, 167 Cal. 706, 140 P. 1073; *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. 255; *Donnally v. Parker*, 5 W. Va. 301, election relates back to date of option; *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Crowley v. Byrne*, 71 Wash. 444, 129 P. 113; *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 932, *lis pendens*; *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 30 A. S. R. 47, 11 L. R. A. 148; *Lazarus v. Heilman*, 11 Abb. N. C. (N. Y.) 93; *Houghwout v. Murphy*, 23 N. J. Eq. 531; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881, 1 Ann. Cas. 986; *City of Birmingham v. Forney*, 173 Ala. 1, 55 So. 618; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *Collins v. Whigham*, 58 Ala. 438; *Daniels v. Davison*, 16 Ves. Jr.

When land is subject to a lease and option to purchase, the lessor and lessee can not vary the terms of the option as against the grantee of the lessor. The grantee stands in the place of the lessor and may enforce the terms of the lease,<sup>4</sup> and where the purchaser from the optionor, or vendor, has notice of option rights on the property, he stands in the same equity as the optionor and will be compelled to perform the contract with the optionee to the same extent as the vendor would have been liable to perform.<sup>5</sup>

Notice to an agent of one taking an option to purchase land, of a prior sale of the land, is not

249; see *Manchester Ship Canal Co. v. Manchester R. Co.*, 2 Ch. Div. 37, 70 L. J. Ch. 468, 84 L. T. Rep. (N. S.) 436, 17 L. T. R. 410, 49 Wkly. Rep. 418; *Croften v. Ormsby*, 25 Sch. & Lef. 583; *Taylor v. Stibbert*, 2 Ves. 439; *Graybill v. Braugh*, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 A. S. R. 894, holds to the contrary (Reporter, p. 559), but in principle is overruled by subsequent decisions of the same court. See Sec. 1223.

<sup>2</sup> Case where the optionor took an assignment of his option to G from G's first assignee, without notice of second assignment by G to M & S, *Moyses v. Hewitt*, 20 Idaho 311, 118 P. 839.

<sup>3</sup> *Savereux v. Tourangeau*, 16 Ont. L. Rep. 600.

<sup>4</sup> *Millard v. Martin*, 28 R. I. 494, 68 Atl. 420; in this case the lessor sought to defeat specific performance at the suit of his grantee by accepting the offer of the lessee-optionee to pay less than the option price.

See *Oland v. McNeil*, 32 Can. Sup. Ct. 23, (modifying 34 Nova Scotia 543), holding that a transferee of an interest in lands under an instrument absolute on its face, although burdened with a trust to sell and account for the price, may validly convey such interest without notice to the equitable owners.

Subsequent mortgagees charged with notice, *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360.

<sup>5</sup> *Wilkins v. Somerville*, 80 Vt. 48, 66 Atl. 893, 11 L. R. A. (N. S.) 1183; *King v. Prospect Point Fishing Club*, (Md.) 94 Atl. 780; *Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265, Ann. Cas. 1912C, 556.

notice to one purchasing the option from the one to whom it was given.<sup>6</sup>

Possession of a tenant under a lease is notice of his option to purchase when inquiry by a purchaser would elicit knowledge of the same,<sup>7</sup> notwithstanding the option was not contained in the recorded lease, the optionee having been in possession a long time and having erected buildings thereon which were occupied by him as a store.<sup>8</sup>

When the purchaser derives title through a deed which contains an option which is sought to be enforced in equity, he is chargeable with constructive notice of the option.<sup>9</sup>

Under the rule, to protect a purchaser of the optioned property without notice of the option thereon, the purchaser must have paid the purchase money in full,<sup>10</sup> and before notice.<sup>11</sup> When the pur-

<sup>6</sup> Chesbrough v. Vizard Inv. Co., 156 Ky. 149, 160 S. W. 725.

<sup>7</sup> Kerr v. Day, 14 Pa. 112, 53 Am. Dec. 526; Harper v. Runner, 85 Neb. 343, 123 N. W. 313; Parker v. Gortatowsky, 127 Ga. 560, 56 S. E. 846; Daniels v. Davison, 16 Ves. Jr. 249; see, however, Taylor v. Kelly, 56 N. C. 240; Clough v. Cook, (Del. Ch.) 87 Atl. 1017, covenant to renew lease at lessee's option.

New lessee with notice holds lease as trustee for old lessee, *McCourt v. Singers-Bigger*, 145 Fed. 103, 76 C. C. A. 73; 7 Ann. Cas. 287; see *Pheby v. Mining Co.*, 10 Ariz. 88, 85 P. 952.

<sup>8</sup> Dengler v. Fowler, 94 Neb. 621, 143 N. W. 944, option in lease, and the same rule holds where the option is recorded.

*Donnally v. Parker*, 5 W. Va. 301.

*Hamilton v. Ingram*, 13 Tex. Civ. App. 604, 35 S. E. 748, seems to hold contrary to the Dengler decision.

<sup>9</sup> *Van Dorn v. Robinson*, 16 N. J. Eq. 256.

<sup>10</sup> *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 A. S. R. 977, 2 Ann. Cas. 421; see *Houghwout v. Murphy*, 23 N. J. Eq. 531.

<sup>11</sup> *Trice v. Comstock*, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; *Veith v. McMurtry*, 26 Neb. 341, 42 N. W. 6; in *Young v. Matthews Turner Co.*, 168 Cal. 671, 143 P. 1029, it is held that the remedy of the optionee, after sale by the optionor, was on the facts, for

chaser has no notice at the time of the purchase, but receives notice before completing all the payments, he must account to the holder of the equities for so much of the purchase money as remains unpaid,<sup>12</sup> but it would seem that a purchaser is protected when at the time of the purchase, without notice, he absolutely obligates himself to take the optioned property and pay the price.<sup>13</sup>

SEC. 516. RIGHTS UNDER JUNIOR AND SENIOR OPTIONS.—Defendant claiming to have purchased under a prior option which had expired before defendant purchased, can not object that the consideration for plaintiff's option was not paid when the contract of option was executed.<sup>1</sup>

An option was given subject to a prior option to purchase at a certain price. The prior option was exercised and the payment provided for therein was made. Thereafter and with notice the holder of the prior option procured a conveyance claimed to be under his option, but for less than the price stated therein, and it was held that the holder of the junior option acquired the right to insist that

damages. See *Marthinson v. King*, 150 Fed. 48, 82 C. C. A. 360; *Manchester S. C. Co. v. Manchester R. Co.*, *supra*.

<sup>12</sup> *Sparks v. Taylor*, 99 Tex. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381.

<sup>13</sup> Purchaser of stock is not affected with notice of a prior option to purchase, though received before making actual payment of the price, where the contract entered into by him for its purchase created an absolute obligation on his part to take and pay for the stock, *Ouderkirk v. Bayless P. & P. Co.*, 199 N. Y. 366, 92 N. E. 798; see *Storms v. Mundy*, 46 Tex. Civ. App. 88, 101 S. W. 258; *Donalson v. Thomason*, 137 Ga. 848, 74 S. E. 762.

<sup>1</sup> *Cummins v. Beavers*, 103 W. Va. 230, 48 S. E. 891, 106 A. S. R. 881, 1 Ann. Cas. 986.

the prior option be exercised according to its terms, so that a purchase by the holder of the prior option at a price less than contracted for did not deprive the holder of the junior option of his right to a conveyance.<sup>2</sup>

Where plaintiffs (optionors) entered into an agreement with defendants for the sale to the latter of a half interest of plaintiffs in their option on land containing deposits of marble, the land to be prospected and developed for the joint interests of the parties, and plaintiffs failed to comply with the conditions of their option, and thereafter one of the defendants obtained an option in his own name on the land, on different terms, and at a higher price, the agreement did not create a trust in the land in favor of plaintiffs which could be enforced after the purchase by one of the defendants under his option.<sup>3</sup>

Where the optionee for seven years took no steps to complete the title, and the optionor retained possession, and paid taxes, claimed title, and gave an option to another, the question of abandonment of the first option is for the jury.<sup>4</sup>

An assignee of a second option without notice of a prior option, takes his option discharged of the prior option.<sup>5</sup>

<sup>2</sup> *Faraday Coal Co. v. Owens*, 26 Ky. L. Rep. 243, 80 S. W. 1171.

<sup>3</sup> *Beulah Marble Co. v. Mattice*, 22 Colo. 547, 45 P. 432; see also *Gaines v. Chew*, 167 Fed. 630; *Commercial Bank v. Weldon*, 148 Cal. 601, 84 P. 171; *Tennille v. Howden*, 177 Fed. 631, 101 C. C. A. 257, agreement between optionee and others to finance option and divide profits, etc.

<sup>4</sup> *Cambria Iron Co. v. Leidy*, 226 Pa. 122, 75 Atl. 186.

<sup>5</sup> *Winslow v. Williams Richards Co.*, 3 N. Brunsw. Eq. 481.

The owner of land heavily incumbered gave an option to convey it to complainant, on her acceptance, at any time within one year, agreeing to deliver a deed with full covenants of warranty, but, believing he would be unable to discharge the incumbrances, he executed another option to defendant on a larger tract, including the land first sold, which defendant accepted, and received a conveyance, with notice of plaintiff's option. At the time of the conveyance the purchase money was distributed among the incumbrancers, and releases executed by them, all of which were in terms made to the original owner of the land, defendant refusing to pay the purchase price, except as it might be applied, in his presence, to secure the releases, and it was held that such payment and application of the purchase price discharged the incumbrances, and merged the same in the title to the property conveyed by the owner to defendant, and hence he was not entitled to claim subrogation to the original rights of the incumbrancers on being compelled to specifically perform the option given by the owner to complainant.<sup>6</sup>

A party having an option to purchase the timber growing upon a tract of land, which is not limited as to time by his agreement, may, by his own acts and by acquiescence in the acts of another, in cutting and removing such timber, and by assisting in the removal of the same, pointing out the timber to the men engaged in cutting it, and raising no objection to the disposal of such timber by the party

<sup>6</sup> Brooks v. Wentz, 61 N. J. Eq. 474, 49 Atl. 147.



asserting an adverse claim thereto, estop himself from asserting any claim under his option.<sup>7</sup>

SEC. 517. EQUITABLE CONVERSION.—The rule of equitable conversion applies to option contracts for the purchase of real estate under an option contract which in certain cases and in accordance with some decisions is considered as personal property.

In the ordinary case of a contract for the sale of land, equity looks on that agreed to be done as actually done and considers the vendee the equitable owner of the land and the interest of the vendor as personalty.<sup>1</sup>

This is in accord with the general rule that a conversion takes place upon the execution and delivery of the contract of sale, that is, when the contract becomes operative. The general rule, however, is subject to the qualification that the intention of the parties, as gathered from the terms of the particular instrument, controls as to the time the conversion is to take place.<sup>2</sup>

An option is not a sale and purchase, nor an agreement of sale and purchase. The option does not itself transfer any interest in the property. It is merely the sale, for a certain time, of the exclu-

<sup>7</sup> *Hanley v. Watterson*, 39 W. Va. 214, 19 S. E. 536.

Verbal agreement that option should be for benefit of all parties is without consideration, *Beulah Marble Co. v. Mattice*, 22 Colo. 547, 45 P. 432.

<sup>1</sup> *Fetter on Equity*, p. 69.

<sup>2</sup> See *Smith v. Loewenstein*, 50 Ohio St. 346, 34 N. E. 159.

sive right or privilege of purchasing property.<sup>3</sup> It would seem, therefore, that, in the absence of an expressed intention in the option to the contrary, a conversion takes place when the option is exercised, that is, when the agreement of sale and purchase comes into existence by election to purchase, and not when the option contract is executed and delivered, otherwise the conversion is made to depend upon a contingency and the status of the property is suspended, so to speak, until the contingency shall happen or the option expire, a rule, it would seem, at variance with the one upon which the doctrine of equitable conversion is founded for, by the latter rule, the status of the property is presently and absolutely fixed.<sup>4</sup>

The question arises when the option is exercised after the death of the optionor. In such case, does the purchase money go to the heirs of the optionor or to his personal representative? The English rule is that the conversion, by relation, is as of the date of the execution and delivery of the option,<sup>5</sup> and

<sup>3</sup> See *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853. *Dickinson v. Dodds*, L. R., 2 Ch. Div. 463, 34 L. T. (N. S.) 607.

<sup>4</sup> See *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, Ann. Cas. 1913B, 62, where the court likens the option privilege to a discretionary power of sale in a will under which a conversion is not worked in the absence of an actual sale.

<sup>5</sup> *Lawes v. Bennett*, 1 Cox 167, 29 Eng. Reprint 1111, holding that where lessor dies leaving will devising his real estate to D and his personal property to E and D the lessee (optionee) timely exercised option to purchase but after death of lessor, purchase money was part of personal estate of lessor.

This rule, however, is not to be extended. Consequently where the leased premises under the option burned and the lessee (optionee) exercised his option to purchase, he is not entitled to the insurance money as part of his purchase; in other words, the election did not, by relation, take effect as of the date of the option contract, as held

some of the American courts have followed that rule.<sup>6</sup> Other American decisions hold the conversion takes place when the option is exercised and that, consequently, the purchase money will go to the heirs of the optionor and not to his personal representative.<sup>7</sup>

in *Lawes v. Bennett*; *Edwards v. West*, 7 Ch. Div. 858, 47 L. J. Ch. 463, 38 L. T. Rep. (N. S.) 481, 26 Wkly. Rep. 507.

- 5 In *Reynard v. Arnold*, L. R., 10 Ch. 386, 23 Wkly. Rep. 804, under the facts there appearing, it was held the landlord was not entitled to retain the insurance under his policy, or to insist that the insurance moneys under the optionee's policy should be applied in restoring the burned property, the optionee having elected.

As to right of insurance moneys, see Sec. 512.

*Townley v. Bedwell*, 14 Ves. Jr. 591, 33 Eng. Reprint 648, rent money belongs to heir; purchase money to personal representative.

*Weeding v. Weeding*, 1 Johns. & H. 424, 4 L. H. 616, 70 Eng. Reprint 812, the option itself goes to residuary legatee.

See also, *In re Adams*, 27 Ch. Div. 394, 54 L. J. Ch. 87, 51 L. T. Rep. (N. S.) 382, 32 Wkly. Rep. 883.

*Collingwood v. Row*, 3 Jur. (N. S.) 785, 5 Wkly. Rep. 484, following *Lawes v. Bennett*, *supra*.

In *Graves v. Graves*, 15 Ir. Ch. 357, the court distinguishes *Lawes v. Bennett* by saying that in the latter case the option was to be exercised within six years "which is very different from an option to be exercised at the end of any number of centuries." As further distinguishing the *Lawes* case, see *Emuss v. Smith*, 2 DeG. & S. 722, 64 Eng. Reprint 323.

- 6 See *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526, extended discussion of rule; rule applied as against purchaser with notice; *Buckwalter v. Klein*, 5 Ohio Dec. 55; *Griffith v. Stewart*, (D. C.) 31 App. Cas. 29; *Newport Waterworks v. Sisson*, 18 R. I. 411, 28 Atl. 336, land specifically devised; purchase price belongs to residuary legatee; see *Keep v. Miller*, 42 N. J. Eq. 100, 6 Atl. 495; *McKay v. Carrington*, Fed. Cas. No. 8, 841, (1 McLean 50).

- 7 See *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150; *Kerr v. Day*, *supra*; *Rockland etc. Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, Ann. Cas. 1913B, 62.

*Smith v. Loewenstein*, 50 Ohio St. 346, 34 N. E. 159, 161. These decisions review the English decisions cited in note 5, *supra*, and reach the conclusion that *Lawes v. Bennett* and the other decisions following it are unsound. On principle, it would seem that the exer-

**SEC. 518. DIVIDENDS ON CORPORATE STOCK.**—Where the owner of corporate stock gave an option agreeing to sell it to defendant, or to a corporation he might incorporate, and at defendant's request delivered it to a corporation, a dividend declared after the option was given, but before the sale was consummated, belongs to the original owner, and not to defendant, notwithstanding a transfer of the stock by the corporation to defendant by endorsement dated back, at defendant's direction, to a day prior to the declaration of the dividend.<sup>1</sup>

The optionee is entitled to dividends declared on the optioned stock, after the exercise of the option to purchase, where the representative of the deceased optionor refused to join in the appointment of arbitrators to ascertain the book value of

cise of the option, being entirely within the discretion of the optionee, it must be held that the conversion takes place, in the absence of a contrary intention appearing from the option, at the time of election, for it is then that the sale is made, and in analogy to sales and agreements, it is then that the conversion takes place, otherwise in cases of long term leases with option to purchase, it might be impossible to ascertain the personal representative of the lessor-optionor, or the distribution of the price.

<sup>7</sup> See *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645, purchase money passed as real estate under will.

*Caldwell v. Frazier*, 65 Kan. 24, 68 P. 1076, takes effect from date of election and not from date of offer, involving destruction of buildings by fire before election.

The option upon death of the optionee passes as personal property, *Gustin v. School District*, 94 Mich. 502, 54 N. W. 156, 34 A. S. R. 361; *McCormick v. Stephany*, 57 N. J. Eq. 257, 41 Atl. 840.

As to homestead filed by wife after grant of option by husband and before exercise of option, *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522.

<sup>1</sup> *Rowe v. White*, 189 N. Y. 523, 82 N. E. 1132, affirming s. c. 112 App. Div. 688, 98 N. Y. S. 729.

the shares in accordance with the provisions of the option agreement.<sup>2</sup>

A seller of stock agreed to pay 10% for ten years on the amount of stock transferred, if such amount was not paid in dividends, by the corporation, but reserved the right to repurchase the stock at a price agreed on, at the end of five years. The company issuing the stock stopped operations in about a year, without ever having declared a dividend, and the buyer brought suit for the dividends for ten years, and it was held the buyer could recover of the seller only the dividends actually due.<sup>3</sup>

SEC. 519. RENTS.—The general rule is that upon timely and proper election under a lease containing an option to purchase, the relation of landlord and tenant ceases and that of vendor and purchaser arises and, consequently, the right of the landlord to rent maturing thereafter, is lost.<sup>1</sup>

An election without payment, or delay in payment where payment is due at the time of election,

<sup>2</sup> In *re Lindsay's Estate*, 210 Pa. 224, 59 Atl. 1074, and the optionor is entitled to interest on the price from time of election. This was an agreement between stockholders giving to survivors an option to purchase the shares of any deceased stockholder.

Case of purchaser of stock from corporation with agreement to repurchase, where purchaser receives the dividends and does not offer to return same or stock dividend received by him, in suit to recover the price where court holds that though it is one at law, yet decides it in accordance with equitable principles, and seemingly denies relief because of this fact, *Wilson v. Torchon L. & M. Co.*, 167 Mo. App. 305, 149 S. W. 1156.

<sup>3</sup> *Hawks v. Bright*, 51 La. Ann. 79, 24 So. 615.

<sup>1</sup> *Wade v. South Pa. Oil Co.*, 45 W. Va. 380, 32 S. E. 169; *Knerr v. Bradley*, 105 Pa. 190, during the term of the lease; *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703, and tender must be made; *Gilbert v. Port*, 28 Ohio St. 276; *Lee v. Cochran*, 157 Ala. 311, 47 So. 581.

does not change the relation of the parties to that of vendor and purchaser so as to stop the liability of the lessee to pay rent after the expiration of the lease.<sup>2</sup> But, under a statute providing for prorating of the rent if election shall take place during a rental period, the lessor is entitled to have the rent prorated where the election is made during such period.<sup>3</sup>

The lessee will not be required to pay both rent and interest and taxes;<sup>4</sup> nor, to pay rents or profits where the optionor resists specific performance,<sup>5</sup> nor, to pay rent during the time necessary to fix the price by arbitration and for the consummation of the purchase where the agreement provides for such proceedings.<sup>6</sup>

A contract provided for the lease of property for two years at a rental of a fixed sum payable in two installments; one due on the execution of the lease, the other on the first day of the second year of the lease. The lessee had the option to purchase the property at any time before the expiration of the lease, on stated terms. It was provided that, if a sale was made before the date fixed for the payment of the second installment of rent, that installment should not be paid. The lessee exercised the option to purchase five days after the installment was due, and a deed to the property was delivered 46 days

<sup>2</sup> *Journe v. Hewes*, 124 Cal. 244, 56 P. 1032.

<sup>3</sup> *Withington v. Nichols*, 187 Mass. 575, 73 N. E. 855.

<sup>4</sup> *Grummer v. Price*, 101 Ark. 611, 143 S. W. 95.

<sup>5</sup> *Brewer v. Sowers*, 118 Md. 681, 68 Atl. 228.

<sup>6</sup> *Washburn v. White*, 197 Mass. 540, 84 N. E. 106; nor when the optionor is not able to convey a good title, *Church v. Standard etc. Co.*, 65 N. Y. S. 116, 52 App. Div. 407.

thereafter. In the negotiations of sale nothing was said concerning this installment of rent, and no reference to it was made in the deed. No demand for it was made until long after the deed was delivered, and suit was not brought until more than a year after the sale. It was held, plaintiff, under the contract, was entitled to recover the full amount of the installment, with interest from the date it was due, and was not estopped from claiming payment of the same.<sup>7</sup>

In another case, the lease was for five years from October, 1905, at a stipulated rent, evidenced by five notes payable October first of each year, and provided that if the lessee, at any time during the term, paid the lessors \$1280 for the land, the lessors would turn over the lease to the lessee and also the unpaid rent notes without further consideration. The lessee, having paid the annual rent for 1905 and 1906, and on August 30, 1907, having given notice of his election to purchase, it was held the lessee was entitled to a conveyance on tender of \$1280 without paying the stipulated rent which would otherwise have matured October first following.<sup>8</sup>

SEC. 520. RIGHT TO COAL MINED. PROFITS MADE, ETC.—Where the optionee, under a coal lease, gives notice of election to purchase the land, but the purchase price was not paid until several months thereafter when the deed was delivered, it was held he did not become the equitable

<sup>7</sup> Granger v. Riggs, 118 Ga. 164, 44 S. E. 983.

<sup>8</sup> Lee v. Cochran, 157 Ala. 311, 47 So. 581.

owner of the land upon the exercise of his option, but only upon payment of the purchase money, and that consequently the optionor was entitled to the price of the coal mined up to the time the purchase money was paid.<sup>1</sup>

Under an option on mining property with the privilege of mining ore and providing that the net proceeds should be applied towards the purchase price, the cost of mining the ore should be deducted in ascertaining the net proceeds.<sup>2</sup>

The seller of a business reserving an option to repurchase, on exercising the option, is not entitled to the profits of the business during the management, by the optionee, under the terms of the agreement.<sup>3</sup>

An option given by one partner to another to purchase the interest of the former at a certain sum, the optionee to assume all liabilities, takes effect by election as of the date of the agreement, so that the optionee is not entitled to deduct from that sum any debts subsequently paid off, notwithstanding there had been an extension of the option time.<sup>4</sup>

Where, after making of a lease with option to purchase, the authorities of the city in which the premises were situated caused the street in front of the premises to be paved, the lessee upon seeking specific performance of the option to purchase, will be required to reimburse the lessor for the amount

<sup>1</sup> *Flynn v. White Breast Coal Co.*, 72 Iowa 738, 32 N. W. 471.

<sup>2</sup> *Hall v. Abraham*, 44 Ore. 477, 75 P. 882.

<sup>3</sup> *Kerting v. Hatcher*, 216 Ill. 232, 74 N. E. 783.

<sup>4</sup> *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37.



already paid by him for the paving and to assume payment of the balance as a condition of granting specific performance.<sup>5</sup>

Where the optionor grants an option on timber lands and, during the option time, cuts timber therefrom, whereupon the optionee gives notice of election to purchase, the optionee is entitled to an allowance on the price for the value of the timber cut by the optionor.<sup>6</sup>

<sup>5</sup> King v. Raab, 123 Iowa 632, 99 N. W. 306.

Water rates, right to, on exercise by city of option to purchase water plant, City of Los Angeles v. Los Angeles City Water Co., 124 Cal. 368, 57 P. 210.

<sup>6</sup> McCowen v. Pew, 147 Cal. 299, 81 P. 958.



## CHAPTER VI.

### ASSIGNMENT

- Sec. 601. Common law and equity rules.
- Sec. 602. Assignability before election.
- Sec. 603. Assignability after election.
- Sec. 604. Option personal to optionee.
- Sec. 605. Express words of assignability.
- Sec. 606. Death or insanity.
- Sec. 607. Leases containing options. Covenants running with land.
- Sec. 608. Estoppel and waiver.
- Sec. 609. Effect of assignment. Rights and liabilities of parties.
- Sec. 610. Miscellaneous cases.

SECTION 601. COMMON LAW AND EQUITY RULES.—At common law the general rule is that rights arising out of a contract can not be assigned. By the Law Merchant, bills of exchange, and by the statute, promissory notes, are made exceptions to the general rule. It would seem that bonds of corporations are also an exception.

The rule in equity is that a chose in action, or rights under a contract, may be assigned whenever the contract is not one for exclusive personal services, and does not involve personal credit, trust or confidence. In equity the assignee may sue in his own name. The equitable rule of assignment was, however, so far recognized in the courts of law as to permit the assignee to sue in the name of the assignor.

The equitable rule is now incorporated into the statutes of most, if not all of the states. And it may be stated as a general rule that the rights of the optionee are now assignable,<sup>1</sup> in accordance with the equitable rule, unless limited by the terms

<sup>1</sup> *Simmons v. Zimmerman*, 144 Cal. 256, 79 P. 451, 1 Ann. Cas. 850; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Myers v. J. J. Stone & Son*, 128 Iowa 10, 102 N. W. 507, 111 A. S. R. 180, 5 Ann. Cas. 912; *Napier v. Darlington*, 70 Pa. 64, option in lease; *Union Coll. Co. v. Oliver*, 23 Cal. App. 318, 137 P. 1082, option to return shares of stock and guaranteeing repayment of price; *Mitchell v. Taylor*, 27 Ore. 377, 41 P. 119, option to repurchase stock.

Option on water right may be assigned, *Thompson Co. v. Pennebaker*, 173 Fed. 849, 97 C. C. A. 591.

Owner of equitable interest can not exercise the option, see Sec. 802.

Cause of action for deceit based on misrepresentation made by the optionor to optionee does not pass to assignee of option to whom misrepresentations were not made, *Puffer v. Welch*, 144 Wis. 506, 129 N. W. 525, Ann. Cas. 1912A, 1120.

of the option contract;<sup>2</sup> but even where so limited, the optionor may waive the limitation, as by receiving part payment from the assignee of the optionee.<sup>3</sup>

SEC. 602. ASSIGNABILITY BEFORE ELECTION.—A mere offer of a contract is not assignable, and for the very plain reason that no right in favor of either party arises until the offer has been accepted. It follows, therefore, that an optionee under an option without consideration to support it, has no right prior to acceptance which he can assign.<sup>1</sup> If, however, the option is supported by a consideration, and, therefore, irrevocable during the time limit, it would seem that, in those jurisdictions where the rule in equity is followed, the optionee has an assignable right prior to acceptance and during the time limit,<sup>2</sup> unless it appears

<sup>2</sup> Myers v. J. J. Stone & Son, *supra*.

<sup>3</sup> Taylor v. Newton, 152 Ala. 459, 44 So. 583.

<sup>1</sup> Meynell v. Surtees, 3 Sm. & Giff. 101, 65 Eng. Reprint 581, 1 Jur. (N. S.) 737, 25 L. J. Ch. 257, 3 Wkly. Rep. 535; see Perkins v. Hadsell, 50 Ill. 216; Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, 543, 24 L. R. A. 339; Sims v. Cordele Ice Co., 119 Ga. 597, 46 S. E. 841; Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830; Wheeling Creek etc. Co. v. Elder, 170 Fed. 215; Sweezy v. Jones, 65 Iowa 272, 21 N. W. 603; Crandall v. Willig, 166 Ill. 233, 46 N. E. 755.

<sup>2</sup> Connor v. Withers, 20 Ky. L. Rep. 1326, 49 S. W. 309; Krhut v. Phares, 80 Kan. 515, 103 P. 117; Winslow v. Dundom, 46 Mont. 71, 125 P. 136; Kreutzer v. Lynch, 122 Wis. 474, 100 N. W. 887, 889; Kerr v. Day, 14 Pa. 112, 53 Am. Dec. 526; Jackson v. Groat, 7 Cow. (N. Y.) 285; Hall v. Center, 40 Cal. 63; Sims v. Lide, 94 Ga. 553, 21 S. E. 220; Perry v. Paschal, 103 Ga. 134, 29 S. E. 703; House v. Jackson, 24 Ore. 89, 32 P. 1027, see Sec. 503, note 1; Chesbrough v. Vizard Inv. Co., 156 Ky. 149, 160 S. W. 725; Strasser v. Steck, 216 Pa. 577, 66 Atl. 87, 88; Napier v. Darlington, 70 Pa. 64; Cameron v. Shumway, 149 Mich. 634, 113 N. W. 287.

from the terms of the option that it was intended as an exclusive personal privilege to the optionee, or where, in particular cases, the option was given because of some personal confidence reposed in the optionee touching the transaction, or because of some personal service to be rendered by him, or where payment of the price is deferred and the credit is extended to the optionee personally.<sup>3</sup>

It should be noted that the assignment of the option, prior to election, does not convey an interest or estate in the property; it merely transfers the right to exercise the option,<sup>4</sup> and, consequently, an assignment of the option by the optionee prior to his election to purchase, does not require the joinder of his wife as she has no dower right therein.<sup>5</sup>

### SEC. 603. ASSIGNABILITY AFTER ELECTION.—An option which has been timely elected

<sup>2</sup> The right of electing to purchase oil, is property capable of being assigned, *Tyler v. Barrows*, 6 Rob. (N. Y.) 104, 29 N. Y. Sup. Ct. 104.

The optionee may lawfully sell the optioned land to a third party before election, *Roper v. Milbourn*, 93 Neb. 809, 142 N. W. 792, Ann. Cas. 1914B, 1225; *Krnut v. Phares*, *supra*.

<sup>3</sup> *Dyer v. Duffy*, *supra*; *Sims v. Cordele Ice Co.*, *supra*; *Winslow v. Dundom*, *supra*.

*Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150, fails to distinguish between a pure offer and an option supported by a consideration and holds that when the offer is made to a particular person and not to "assigns" it can be accepted by such person alone, and not by his assignee.

*Sutherland v. Parkins*, 75 Ill. 338, holding right of election does not pass to heir of optionee who dies without electing, but this was placed on the ground that the heirs could not take money from the personal estate and exercise a right which the ancestor might not have exercised.

<sup>4</sup> *Dyer v. Duffy*, *supra*.

<sup>5</sup> *Fletcher v. Painter*, 81 Kan. 195, 105 P. 500.

is converted into an agreement to sell. The optionee, by exercise of the option, becomes a vendee and is thus clothed with all of the rights of the vendee as distinguished from an optionee, including the right to assign, in accordance with the rule applicable to agreements of sale.<sup>1</sup>

SEC. 604. OPTION PERSONAL TO OPTIONEE.—Of course, if the option expressly provides that it may be exercised by the optionee but “by no other person” the optionee has no assignable rights thereunder,<sup>1</sup> and the same rule obtains when, by the terms of the option, the consent of the optionor is necessary to make the assignment valid.<sup>2</sup>

<sup>1</sup> See decision note 2, Sec. 602, *supra*; Perkins v. Hadsell, 50 Ill. 216; Perry v. Paschal, 103 Ga. 134, 29 S. E. 703; Kreutzer v. Lynch, 122 Wis. 474, 100 N. W. 887, 889; Robinson v. Perry, 21 Ga. 183, 68 Am. Dec. 455, lease.

Right of assignee to recover account against third person purchased under option contract, where optionee defaulted, Frye-Bruhn Co. v. McGowan, 38 Wash. 536, 80 P. 761.

<sup>1</sup> Myers v. Stone, 128 Iowa 10, 102 N. W. 507, 111 A. S. R. 180, 5 Ann. Cas. 912, the court holds the right to discriminate between purchasers is one of the attributes of private ownership of property, and inheres in the right of freedom to contract, but that an “unrestricted option is assignable.”

Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150, holds, in effect, that an option privilege is personal to optionee, unless it has words of assignability, following the rule of “offers.”

<sup>2</sup> Smith v. Jones, 21 Utah 270, 60 P. 1104; Andrew v. Meyerdirck, 87 Md. 511, 40 Atl. 173; Behrens v. Cloudy, 50 Wash. 400, 97 P. 450. Stipulation against assigning lease includes option therein, Behrens v. Cloudy, *supra*.

An agreement to sell is not an assignment, Ackerman v. Maddux, 26 N. D. 50, 143 N. W. 147.

Restriction does not apply to assignment by operation of law, In re Benz, 221 Fed. 123.

It seems that where, by the terms of the option, the price is all payable in cash, no question of personal confidence or credit on the part of the optionee can arise,<sup>3</sup> but where a credit on the price is given by the option, the assignee may not substitute his credit, or his note or obligation, in lieu of the optionee's,<sup>4</sup> unless the option runs to the optionee and "his assigns."<sup>5</sup>

The point in this and other like decisions is not directly that the optionee has no assignable rights but rather that by his assignment the optionee may not, in the absence of words of assignability, substitute the credit of some other person. If, for instance, the assignee, upon acceptance, tenders the note of original optionee, in accordance with the terms of the option, the rule would not apply. It was so held in a case where an option ran to B and C, the price being payable partly in cash and the balance secured by the note and mortgage of B and C. B assigned to C and C timely tendered the joint note and mortgage of himself and B. The tender

<sup>3</sup> Winslow v. Dundom, 46 Mont. 71, 125 P. 136.

<sup>4</sup> Menger v. Ward, 87 Tex. 622, 30 S. W. 853; Rice v. Gibbs, 40 Neb. 264, 58 N. W. 724, overruling s. c. 33 Neb. 460, 50 N. W. 436, the tender by the assignee was held insufficient; see Pearson v. Millard, 150 N. C. 303, 63 S. E. 1053; Sims v. Cordele Ice Co., 119 Ga. 597, 46 S. E. 841, distinguishing Sims v. Lide, 94 Ga. 553, 21 S. E. 220, and Perry v. Paschal, 103 Ga. 134, 29 S. E. 703, on the ground that the price was payable in cash; Macon Auto. Co. v. Heard, 142 Ga. 264, 82 S. E. 658.

Optionee may not substitute third person as purchaser, Vanderlip v. Peterson, 16 Manitoba 341.

<sup>5</sup> Abel v. Gill, 95 Neb. 279, 145 N. W. 637, distinguishing Rice v. Gibbs, *supra*.



was held to be sufficient and specific performance was allowed.<sup>6</sup>

A contract whereby the owner of land gives a lawyer the option to buy it at a certain price, in consideration of the latter's taking all legal steps to perfect the title, can not be enforced by the assignee of the lawyer since, as the Court says, an executory contract for personal services requiring skill is not assignable.<sup>7</sup>

So, a contract to convey to a person, one of four pieces of land, to be selected by him, can not be assigned to another person so as to give the latter the right to make the selection.<sup>8</sup> But the fact that the option gave the optionee the right to erect a dam, the location and height of which were to fix one of the lines of the land, did not render the option non-assignable by the optionee.<sup>9</sup>

The optionor may assign the option and the principle of personal confidence does not arise, though the option calls for a warranty deed, where the

<sup>6</sup> *Souffrain v. McDonald*, 27 Ind. 269; see *Rice v. Gibbs*, *supra*; *Pearson v. Millard*, *supra*.

<sup>7</sup> *Sloan v. Williams*, 138 Ill. 43, 27 N. E. 531, 2 L. R. A. 496; rule would be otherwise if contract had been performed before assignment.

See *Wilks v. Georgia Pac. R. Co.*, 79 Ala. 180, similar option held assignable.

Contract to drill for commercial substances is not personal and may be assigned, *Anse La Butte Oil Co. v. Babb*, 122 La. 415, 47 So. 754.

So is contract to raise and sell grapes, *La Rue v. Groezinger*, 84 Cal. 281, 24 P. 42, 18 A. S. R. 179.

<sup>8</sup> *McQueen v. Chouteau's Heirs*, 20 Mo. 222, 64 Am. Dec. 178, the right of choice held strictly personal.

Right in optionee to judge of sufficiency of title is assignable, *Simmons v. Zimmerman*, 144 Cal. 256, 79 P. 451, 1 Ann. Cas. 850.

<sup>9</sup> *Wilkins v. Hardaway*, 159 Ala. 565, 48 So. 678.

warranty of the optionor appears in the chain of title.<sup>10</sup>

SEC. 605. EXPRESS WORDS OF ASSIGNABILITY.—In nearly all jurisdictions the rights of the optionee, under an option supported by a consideration, are assignable in the absence of any words of assignability, except, of course, where the nature, or the terms, of the option bring it within some recognized exception to the rule, for it is said “assignability is now the rule; non-assignability the exception.”<sup>11</sup>

Express words of assignability, therefore, are now important, if at all, as they may affect an option contract which would otherwise be an exception to the rule, or covenants running with the land.<sup>2</sup>

It would seem that the effect of their use is limited to those jurisdictions which still follow the old common law rule and, also, in some cases, as bearing upon the interpretation of the contract as falling within or without the exceptions to the general rule.<sup>3</sup>

The authorities, however, concur in the general rule that an option made to a person named therein and to “his heirs and assigns” is assignable.<sup>4</sup>

10 *Big Ben L. Co. v. Hutchings*, 71 Wash. 345, 128 P. 652.

1 *Simmons v. Zimmerman*, 144 Cal. 256, 79 P. 451, 1 Ann. Cas. 850; *Connor v. Withers*, 20 Ky. L. Rep. 1326, 49 S. W. 309.

2 *Anse La Butte Oil Co. v. Babb*, 122 La. 415, 47 So. 754; see Sec. 607.

3 *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830.

4 *Landon v. Morehead*, 34 Okl. 701, 126 P. 1027; *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645; *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830, where supported by a consideration; *Hollander v.*

An option to sell given to a person “his heirs and assigns” is, in accordance with the general rule, assignable by him but is not assignable by the assignee where the assignment does not run to him and to his heirs and assigns.<sup>5</sup>

An option, not assignable in terms, given to one who represents himself to be the agent and acting for a party known to the owner and to whom the owner desires to sell, is not assignable. This was put on the ground that the optionee was a promoter and that the optionor was looking to the solvency and responsibility of the other party. The facts show, however, that the optionor withdrew the option before acceptance and, there being no consideration, the case should have turned on that point.<sup>6</sup>

SEC. 606. DEATH OR INSANITY.—As to mere offers, the death or insanity of either party before acceptance causes the offer to lapse.<sup>1</sup> Where, therefore, an ancestor had the privilege to accept an offer of sale within a year and died within the year without accepting, he had no estate which descended to his heirs and they had not the right to accept the same within the time allowed their

Central Metal etc. Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135; Ankeny v. Richardson, 187 Fed. 550, 109 C. C. A. 316, lease; Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150.

<sup>5</sup> Wheeling Creek etc. Co. v. Elder, 170 Fed. 215, there was no consideration for this option.

Words of assignability are not limited to the first assignment, but include every purchaser by voluntary sale as well as upon execution, Jackson v. Groat, 7 Cow. (N. Y.) 285.

<sup>6</sup> Snow v. Nelson, 113 Fed. 353.

<sup>1</sup> See Sec. 709.

ancestor, the offer being personal. This was put on the ground also that thereby the heir would be compelled to take money from the personal estate in order to purchase for himself that which his ancestor was not bound to purchase and perhaps would not have purchased.<sup>2</sup>

An option, however, stands upon the same footing as any other contract right. Thus, an option in a note giving the maker the privilege of delivering certain shares of stock in lieu of paying the principal in money, does not expire upon the death of the maker, but survives to his estate, and the executrix of his will is authorized, under the laws of California, to exercise the option and pay the note by delivering the shares, and the fact that, upon the death of the maker, the title to the shares passed at once to his legatees, is immaterial since they succeed thereto subject to the right of the executrix to exercise the option and to make payment of the note therewith.<sup>3</sup>

If the option is not personal, clearly, since the option does not vest any estate in the land, it passes

<sup>2</sup> Sutherland v. Parkins, 75 Ill. 338.

The same conclusion was also reached in *Newton v. Newton*, 11 R. I. 390, 23 Am. Rep. 476; see also *Cousins Re Alexander v. Cross*, L. R. 30 Ch. Div. 203.

*Mohn v. Mohn*, 148 Iowa 288, 126 N. W. 1127. This case did not involve a strict option but was a devise under a will subject to a charge.

But see *Adams v. Kensington Vestry, In re*, 54 L. J. Ch. 87, 27 Ch. Div. 394, 51 L. T. Rep. (N. S.) 382, 32 Wkly. Rep. 883, holding administrator could exercise option for the benefit of the next of kin.

<sup>3</sup> *Vance's Estate, In re*, 152 Cal. 760, 93 P. 1010; see *Ankeny v. Richardson*, 187 Fed. 550, 109 C. C. A. 316; *Simmons v. Zimmerman*, 144 Cal. 256, 79 P. 451, 1 Ann. Cas. 850; *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645.

to the personal representative of the deceased optionee as personal property.<sup>4</sup>

Land leased with option to purchase, upon death of the lessor, intestate, passes to his heirs subject to the lease and option and to the dower interest of his widow who did not sign,<sup>4</sup> and when the agreement expressly bound the parties, their heirs, etc., the death of the lessor did not affect the right to exercise the option.<sup>5</sup>

**SEC. 607. LEASES CONTAINING OPTIONS. COVENANTS RUNNING WITH LAND.**—A provision in a lease giving the lessee, “his heirs and assigns,” the right or option to purchase the leased premises, is a covenant running with the land and passes to an assignee of the leasehold term,<sup>1</sup> and the same rule obtains with reference to an option to

<sup>4</sup> *Gustin v. School District*, 94 Mich. 502, 54 N. W. 156, 34 A. S. R. 361; see *McCormick v. Stephany*, 57 N. J. Eq. 257, 41 Atl. 840, option to renew unexpired option to purchase; it is otherwise when the privilege or option is personal, *Newton v. Newton*, 11 R. I. 390, 23 Am. Rep. 476, that is, not assignable, *Sims v. Cordele Ice Co.*, 119 Ga. 597, 46 S. E. 841.

<sup>5</sup> *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, Ann. Cas. 1913B, 62.

<sup>1</sup> *Laffan v. Naglee*, 9 Cal. 663, 70 Am. Dec. 678; *Hollander v. Central Metal etc. Co.*, 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135; *Kadish v. Lyon*, 229 Ill. 35, 82 N. E. 194; *Albert Brick etc. Co. v. Nelson*, 27 N. Bruns. 276; *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, Ann. Cas. 1913B, 62; *House v. Jackson*, 24 Ore. 89, 32 P. 1027; *In re Adams*, 27 Ch. Div. 394, 54 L. J. Ch. 87, 51 L. T. Rep. (N. S.) 382, 32 Wkly. Rep. 883; *Charles J. Smith Co. v. Anderson*, (N. J. Eq.) 95 Atl. 358; and binds the grantee of the lessor, see *Callan v. McDaniel*, 72 Ala. 96; *Leppla v. Mackey*, 31 Minn. 75, 16 N. W. 470, unless otherwise provided in the lease.

An option in a lease giving the lessor the right to pay for improvements at appraised value, or continue the lease for another year, is binding on lessor's assignee, *Irvin v. Simonds*, 11 N. Bruns. 190.

renew,<sup>2</sup> but a contract to sell certain mining property which is personal and does not, in terms, run to the heirs and assigns of the purchaser and under which, although given possession, the purchaser could not sell or assign without the seller's consent, is not a covenant running with the land.<sup>3</sup>

An assignment of a lease as "indenture of lease" carries with it an option to purchase contained therein,<sup>4</sup> and the assignee of the lease may exercise the right of option and have specific performance.<sup>5</sup> But the rule is otherwise if, by the terms of the

<sup>2</sup> *Blount v. Connolly*, 110 Mo. App. 603, 85 S. W. 605; *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455; *Bank of Greenville v. Gornto*, 161 N. C. 341, 77 S. E. 222; *Warner v. Cochrane*, 128 Fed. 553, 63 C. C. A. 207; *McClintock v. Joyner*, 77 Miss. 678, 27 So. 837, 78 A. S. R. 541; *Cook v. Jones*, 96 Ky. 283, 28 S. W. 960, 16 K. L. Rep. 469; *Connor v. Withers*, 20 Ky. L. Rep. 1326, 49 S. W. 309, not running to "heirs and assigns;" *Kolasky v. Michels*, 120 N. Y. 635, 24 N. E. 278; *Spangler v. Spangler*, 11 Cal. App. 321, 104 P. 995; *Lawes v. Bennett*, 1 Cox 167, 29 Eng. Reprint 1111; *Townley v. Bedwell*, 14 Ves. Jr. 591, 33 Eng. Reprint 648; *Daniels v. Davison*, 16 Ves. Jr. 249.

*Shelburne v. Biddulph*, 6 Bro. P. C. 356, 2 Eng. Reprint 1131, perpetual renewal is real covenant and goes with the land.

*Buckland v. Papillon*, L. R. 2 Ch. 67, 12 Jur. (N. S.) 992, 36 L. J. Ch. 81, 15 L. T. Rep. (N. S.) 378, 15 Wkly. Rep. 92, where it is held that the leasehold estate passed to the assignee in bankruptcy and upon sale by him option passed to purchaser.

<sup>3</sup> *Smith v. Jones*, 21 Utah 270, 60 P. 1104; see Sec. 604, note 2.

<sup>4</sup> *Blakeman v. Miller*, 136 Cal. 138, 68 P. 587, 89 A. S. R. 120; *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560; see *Napier v. Darlington*, 70 Pa. 64.

But there may be an assignment of the lease without an assignment of the option, *Doddridge etc. Co. v. Smith*, 154 Fed. 970.

<sup>5</sup> *Jackson etc. v. Groat*, 7 Cow. (N. Y.) 285; see *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526, agreement to give option; *Napier v. Darlington*, 70 Pa. 64.

*Hurley-Tobin Co. v. White*, (N. J.) 94 Atl. 52, where endorsement on lease to recognize H in place of the lessee, gives H the right of renewal and option to purchase contained in the lease.

lease, the written consent of the lessor is required, and such consent has not been obtained.<sup>6</sup>

One co-tenant may assign the lease to the other co-tenant and such assignment conveys the right to exercise the option.<sup>7</sup>

The assignee, of course, stands in the shoes of his assignor, and when the option contains restrictive covenants as to the use of the land, he is bound to accept a deed containing such restrictive covenants.<sup>8</sup>

The grantee of land subject to a lease containing an option to lessee to purchase, stands in the place of the lessor and may enforce the terms of the lease.<sup>9</sup>

A sub-lessee is not entitled as such to take advantage of an option to renew given by the original lease, but when he has been substituted in the lessee's place by him, and has entered into possession, the sub-lessee may exercise the renewal in the name of the original tenant but not in his own name.<sup>10</sup>

SEC. 608. ESTOPPEL AND WAIVER.—  
Though an option is not assignable without the optionor's consent, yet if the optionor accepts part

<sup>6</sup> Behrens v. Cloudy, 50 Wash. 400, 97 P. 450; Andrew v. Meyerdirek, 87 Md. 511, 40 Atl. 173; Upton v. Hosmer, 70 N. H. 493, 49 Atl. 96.

<sup>7</sup> Pearson v. Millard, 150 N. C. 303, 63 S. E. 1053; Spangler v. Spangler, 11 Cal. App. 321, 104 P. 995, extension of lease.

<sup>8</sup> American Strawboard Co. v. Holdeman Paper Co., 83 Fed. 619, 27 C. C. A. 634; also Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Reprint 1143, 15 Eng. Rul. Cas. 254.

<sup>9</sup> Millard v. Martin, 28 R. I. 494, 68 Atl. 420.

<sup>10</sup> Cifelli v. Santamaria, 79 N. J. L. 354, 75 Atl. 434.

payment from the assignee, the former will be bound to carry out the contract with the latter.<sup>1</sup> So, where the optionor delivers to the assignee the certificate of title to the land required by the option.<sup>2</sup>

The assignee of the optionee may not raise the question of assignability of the option when he has entered into possession of the lands and rented them, and made part payment on the price,<sup>3</sup> and it seems the same rule applies when the optionor recognizes the assignment and negotiates with the assignee with reference to payment of price and sufficiency of title.<sup>4</sup> But, of course, no estoppel could arise against the optionor when the assignee of the lessee (optionee) was "plainly informed" by the lessor before "anything was done by the assignee in reliance thereon" that the lessee had no right to assign the lease, the lessor merely collecting the rents.<sup>5</sup>

A proviso in a lease against assignment by the lessee without the consent of the lessor, is for the benefit of the lessor and he may waive a breach of the condition.<sup>6</sup>

## SEC. 609. EFFECT OF ASSIGNMENT. RIGHTS AND LIABILITIES OF PARTIES.— As to the rights of the assignee of the optionee, it

<sup>1</sup> Taylor v. Newton, 152 Ala. 459, 44 So. 583.

<sup>2</sup> Simmons v. Zimmerman, 144 Cal. 256, 79 P. 451, 1 Ann. Cas. 850.

<sup>3</sup> Cramer v. Mooney, 59 N. J. Eq. 164, 44 Atl. 625.

<sup>4</sup> Womack v. Coleman, 92 Minn. 328, 100 N. W. 9.

<sup>5</sup> Myers v. J. J. Stone & Son, 128 Iowa 10, 102 N. W. 507, 111 A. S. R. 180, 5 Ann. Cas. 912, nor by placing an engine and pump in the mine so that the assignee might better work the mine.

<sup>6</sup> Winslow v. Dundom, 46 Mont. 71, 125 P. 136.



is held that he is not protected as a *bona fide* purchaser for value, as against any defects which can be asserted by the optionor against his optionee, since the rule extends only to cases where the legal title is purchased and not to an option though supported by a consideration.<sup>1</sup>

The general rule is that, when the option is assignable, an assignment of it vests in the assignee all the rights which the assignor had at the time of the assignment and no more.<sup>2</sup> Thus, an assignment of an option on a large tract of land in relation to which there was an agreement to construct a line of railway to it, if accepted within a certain time, and providing that the option should not take effect until such compliance, an assignee of the option took it subject to the contingency of acceptance of the railway agreement though he had no notice of that writing.<sup>3</sup>

<sup>1</sup> *National Oil & P. L. Co. v. Teel*, 95 Tex. 586, 68 S. W. 979, this is based on the rule that the purchaser of an equitable title takes it with all its imperfections and equities; see also *Storms v. Mundy*, 46 Tex. Civ. App. 88, 101 S. W. 258, fraud of optionor's agent; *Trice v. Comstock*, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; *Henry v. Black*, 213 Pa. 620, 63 Atl. 250; *Seibel v. Higham*, 216 Mo. 121, 115 S. W. 987, trust.

<sup>2</sup> See *Cameron v. Shumway*, 149 Mich. 634, 113 N. W. 287; *Gray v. Pelton*, 67 Ore. 239, 135 P. 755; *Salisbury v. LaFitte*, 21 Colo. App. 13, 121 P. 952.

*Moyses v. Hewitt*, 20 Idaho 311, 118 P. 839, case where optionee assigned option to Y, and Y then assigned to optionor after which the optionee assigned the option to M, who sought to enforce same, and it was held the optionor was under no obligation to convey to M.

*Stephens v. Coryell*, 169 Mich. 48, 134 N. W. 1094, case where contract for sale of land was reformed to constitute lease and option to purchase.

<sup>3</sup> *Shuttleworth v. Kentucky Coal I. & D. Co.*, 22 Ky. L. Rep. 1341, 60 S. W. 534.

The effect of an assignment by the optionee when the option is assignable, is to clothe his assignee with the right to exercise the option and upon election and tender to enforce the contract thus raised. But the assignment does not enlarge the rights of the optionor. Thus, when an agent procured an option in his own name, but, in fact, for the benefit of his principal, to whom he assigned the option and who agreed to make the deferred payments, the optionor could not compel the principal to make the payments called for by the option.<sup>4</sup>

A clause in an option giving the optionee the right to pass upon and reject the title as insufficient, passes to the assignee of the optionee.<sup>5</sup>

The assignee of the vendee is not subject to the obligations of the contract of sale, except on his option to enforce it by specific performance,<sup>6</sup> or unless he has contracted to become responsible to

<sup>3</sup> National Oil & P. L. Co. v. Teel, 95 Tex. 586, 68 S. W. 979, assignee of oil option not bound by fraud of assignor, on ground that rule as to *bona fide* purchasers applies only to cases where purchaser has taken legal title.

Measure of damages for misrepresentations by optionee of price paid for option on assignment of part interest, Mayo v. Wahlgreen, 9 Colo. App. 506, 50 P. 40.

<sup>4</sup> Rockwell v. Edgecomb, 72 Wash. 694, 131 P. 191; see Frye-Bruhn Co. v. McGowan, 38 Wash. 536, 80 P. 761.

An option taken by an agent in his own name but under an oral agreement that it was for his principal, entitles the latter to the benefit of the option as against an assignee of the agent, Henry v. Black, 213 Pa. 620, 63 Atl. 250.

Partial assignment, Andrew v. Meyerdirck, 87 Md. 511, 40 Atl. 173.  
As to *bona fide* purchaser, notice, etc., see Sec. 515.

<sup>5</sup> Simmons v. Zimmerman, 144 Cal. 256, 79 P. 451, 1 Ann. Cas. 850.

<sup>6</sup> Couch v. Crane, 142 Ga. 22, 82 S. E. 459.

the vendor for the promises of the purchaser,<sup>7</sup> and this rule holds, notwithstanding the contract of sale provides that the conveyance therein shall bind the assigns of the parties.<sup>8</sup>

One holding an option for the purchase of land and agreeing to sell it to another, can not, in derogation of his purchaser's rights, take a conveyance to himself and wife.<sup>9</sup>

SEC. 610. MISCELLANEOUS CASES.—An assignment by the optionee of his interest in an option, is a valid consideration for a note.<sup>1</sup>

<sup>7</sup> *South Texas Mtge. Co. v. Coe*, (Tex. Civ. App.) 166 S. W. 419.

<sup>8</sup> *Bimrose v. Matthews*, 78 Wash. 32, 138 P. 319, also holding that the assignee may be required to pay the price or surrender the land, or the land may be sold to satisfy the debt.

<sup>9</sup> *Solomon v. Shewitz*, (Mich.) 152 N. W. 196.

Case where optionee, after default of his assignee attempts to carry out option and recover money from escrow bank, *White v. Bank of Hanford*, 148 Cal. 552, 83 P. 698.

Granting of an option does not prevent the optionor from disposing of the property subject to the option. However, the grantee, with notice of the option, stands in the "shoes" of the optionor, *Elliott v. DeLaney*, 217 Mo. 14, 116 S. W. 494.

Optionor is not relieved from liability on covenant for renewal of lease by conveyance of the premises, *Neal v. Jefferson*, 212 Mass. 517, 99 N. E. 334, Ann. Cas. 1913D, 205.

Payment to optionee in extinguishment of his rights, does not extinguish rights of assignee when party making payment knew of the assignment, *Nance v. Polk*, (Ark.) 171 S. W. 1195.

Case where assignee of optionee permits option to lapse and optionee received stipulated amount for assignment, *Scott v. Hughes*, 66 W. Va. 573, 66 S. E. 737.

An assignment by a corporation of an undivided interest in option contracts, to one stockholder subject to the control of the other stockholders, does not vest any title, *Hardinge v. Empire Zinc Co.*, (Ariz.) 148 P. 306.

<sup>1</sup> *Hanna v. Ingram*, 93 Ala. 482, 9 So. 621.

Where an agent is empowered by writing to sell land under arrangements implying a cash sale, his assignment of the writing, without payment of the price, is not a sale.<sup>2</sup>

The assignee of an option is not, under the Texas statutes, protected as a *bona fide* purchaser.<sup>3</sup> Where the optionee is within the rule, it seems that to make him a purchaser for value, it is necessary that the purchase price has been paid.<sup>4</sup>

The assignee is entitled to purchase for the same price as the assignor.<sup>5</sup>

Upon acceptance of the option by the assignee he becomes obligated to pay the assignor the price stipulated in the option, which was the difference between the price per acre fixed by the assignor's option from the owner of the land, and the assignment price of \$40 per acre.<sup>6</sup>

The fact that the optionee, during the term of his option, contracted to sell the land to a third person, does not prevent him from maintaining suit

<sup>2</sup> *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339.

<sup>3</sup> *National Oil etc. Co. v. Teel*, 95 Tex. 586, 68 S. W. 979, affirming 67 S. W. 545.

<sup>4</sup> *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 A. S. R. 977, 2 Ann. Cas. 421; see Sec. 515.

When subject to trust deed, *Kaufman v. All Persons*, 16 Cal. App. 388, 117 P. 586.

<sup>5</sup> *Pollard v. Sayre*, 45 Colo. 195, 98 P. 816.

<sup>6</sup> *Strasser v. Steck*, 216 Penn. 577, 66 Atl. 87.

An assignment of an option construed as obligating the assignee to pay the balance of the price for the assignment only in the event of his election, *Caine v. Hagenbarth*, 37 Utah 69, 106 P. 945; see *Lisenby v. Newton*, 120 Cal. 571, 52 P. 813, 65 A. S. R. 203.

for specific performance on the ground that he has an adequate remedy at law.<sup>7</sup>

An agreement of a lessor, endorsed on a lease, to recognize a third person as lessee in place of the original lessee, and to renew the agreement on request, for another period of six years, gives the third person not only the optional right of the original lessee, under the lease, to purchase, but also the right to renewal for the six years.<sup>8</sup>

<sup>7</sup> *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586, 12 Ann. Cas. 88.

But the assignor would not be entitled to consideration for the assignment if he was acting as agent for the assignee or as a broker for the owner, see *Graves v. Dill*, 159 Mass. 74, 34 N. E. 336.

Receipt for money paid by optionee given by him to L to whom he had assigned a share in the option on account of an option-sale of the option, held not to show a sale by L, *Lazier v. Cady*, 44 Wash. 339, 87 P. 344.

<sup>8</sup> *Hurley-Tobin Co. v. White*, (N. J.) 94 Atl. 52.



## CHAPTER VII.

### DISCHARGE OF OPTION CONTRACT.

- Sec. 701. Generally.
- Sec. 702. Breach by optionor prior to election.
- Sec. 703. Withdrawal or revocation. Offer and option distinguished.
- Sec. 704. Withdrawal or revocation. Communication of notice necessary.
- Sec. 705. What constitutes revocation. Notice thereof.
- Sec. 706. Same. Cases.
- Sec. 707. Expiration of time limit.
- Sec. 708. Reservation of right to terminate.
- Sec. 709. Death or insanity. Bankruptcy.
- Sec. 710. Abandonment. Surrender.
- Sec. 711. Renunciation.
- Sec. 712. Rescission.
- Sec. 713. Substitution of new contract or of new term.
- Sec. 714. Breach by optionee prior to election.
- Sec. 715. Same. Failure to pay rent as discharge of option in lease.
- Sec. 716. Same. Miscellaneous covenants and agreements.
- Sec. 717. Same. Waiver of optionee's breach.
- Sec. 718. Conditional election.
- Sec. 719. Election.

SECTION 701. GENERALLY.—Having treated of the characteristics, formation, consideration, validity and assignment of the option contract as well as of the interest or estate of the optionee under such contract, the next inquiry is concerning the different methods of discharging the contract. The common forms are: (a) withdrawal, abandonment, renunciation, repudiation and rescission; (b) expiration of the option time limit, that is, lapse of time, without election; (c) death or insanity; (d) performance, that is, election; (e) breach by the optionee prior to election; and (f) breach by the optionor prior to election.

SEC. 702. BREACH BY OPTIONOR PRIOR TO ELECTION.—Breach of the option contract by the optionor prior to election, in virtue of the nature of the option contract, must be with reference to the covenant to convey upon proper and seasonable election, for, in the common option, this is the only covenant on the part of the optionor.

As a general statement, the breach may consist of an attempted, but unauthorized, withdrawal of the option privilege, the repudiation of the contract, or any other positive and unequivocal act which discloses a present fixed intention on the part of the optionor not to keep and perform his covenant to convey.<sup>1</sup> These are classed as withdrawal

<sup>1</sup> An option in a lease giving the lessee the “first refusal” of buying the premises, under the reserved right of the lessor to sell during the term, is not breached by a conveyance to a third person, the deed of the optionor reserving the use of the premises for the full term of the lease, *Blanchard v. Ames*, 60 N. H. 404; also *Callaghan v. Hawkes*, 121 Mass. 298; *Raymer v. Hobbs*, (Cal. App.) 146 P. 906; also *Collinson v. Lettson*, 6 Taunt. 224, 2 Marsh 1, 128 Eng.



or revocation, and repudiation or renunciation, and upon taking place before the expiration of the option time limit, the optionee has the right to treat the option as discharged. But it is optional with the optionee so to treat it, or to hold the optionor to performance, in accordance with the rule that each party to a contract has the right to maintain the contract relation up to the time performance is due, and that, consequently, the optionor, in the case noted, can not anticipate a breach which will bind the optionee unless the latter elects to treat it as a breach.

Breach of the option contract by the optionor during its time limit does not, therefore, affect the right of the optionee to elect after the breach and during its time limit.<sup>2</sup> However, if the optionee treats the act as a breach he is, according to what seems to be the prevailing rule, entitled to sue immediately for damages and is not required to wait until after the expiration of the option time limit.<sup>3</sup>

Reprint 1020, sale of the optioned property as part of an entire estate, for one entire price.

<sup>1</sup> It is not a breach by the optionor when he bargains the property during the option time only contingently upon failure of the optionee to elect, *Smith v. Lawrence*, 98 Me. 92, 56 Atl. 455.

Bankruptcy of optionor, see *In re Neff*, 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349.

<sup>2</sup> See *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586, 12 Ann. Cas. 88.

<sup>3</sup> *Roehm v. Horst*, 178 U. S. 1, 44 L. Ed. 953, 20 S. Ct. 780, following *Hochester v. De La Tour*, 2 El. & Bl. 678. See *In re Neff*, *supra*, (bankruptcy), and Sec. 1104.

On principle it would seem the rule of anticipatory breach applies to an executory bilateral contract and not to an act like election under a one-sided contract or an option, see Secs. 711, 801.

The subject of anticipatory breach is involved in some conflict of authority. While its presentation is not necessary to the subject in hand, reference is made, in the notes, to some leading and interesting decisions on the subject.<sup>4</sup>

If the optionee does not treat the act as a breach, but stands upon his option rights, it will, it seems, be necessary for him properly and seasonably to exercise the option privilege, for while repudiation, for instance, will, in certain cases, excuse timely tender and delay in payment of the price which have to do with the performance of the contract, it does not dispense with election by the optionee, since such act is necessary to turn the option agreement into a binding promise on the part of the optionor to convey, and a mere repudiation, or breach, does not work this result.<sup>5</sup>

<sup>3</sup> It is held in *Harle v. Haggin*, 116 N. Y. S. 51, 131 App. Div. 742, that an option to purchase extending over several years is not breached by the optionor until there is an election and tender of performance.

Under an option to repurchase land the exercise of the option and tender of a deed of re-conveyance by the grantee, are not excused because the grantor informed the grantee that he did not then have the money to repurchase, *Curtis v. Sexton*, 142 Mo. App. 179, 125 S. W. 806; but a statement by the seller to the purchaser, at the time the latter demanded to repurchase, that he "could not do it" is an "offer and refusal" under the California statute, and demand and offer need not be made at the exact expiration of the fixed time, *Howard v. Galbraith*, 13 Cal. App. 373, 109 P. 889.

<sup>4</sup> See *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938, 28 L. R. A. 760, where the conflicting cases are reviewed. Also *The McCall Co. v. Icks*, 107 Wis. 232, 83 N. W. 300; *Anderson v. Kirby*, 125 Ga. 62, 54 S. E. 197, 114 A. S. R. 185, 5 Ann. Cas. 103; *Payne v. Melton*, 67 S. C. 233, 45 S. E. 154; see cases in note 3, *supra*.

*Sullivan v. McMillan*, 26 Fla. 543, 8 So. 450, 457, noting the distinction sometimes made between the right to sue before the time fixed and waiver of performance merely.

<sup>5</sup> See Sec. 868, waiver.

See *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12, 17, 62 A. S. R. 193, condition precedent.

**SEC. 703. WITHDRAWAL OR REVOCATION. OFFER AND OPTION DISTINGUISHED.**—An offer may be withdrawn by the party making it at any time before its unconditional acceptance by the party to whom it is made,<sup>1</sup> and

<sup>5</sup> The text is here treating of the bilateral contract and its enforcement. As to the option contract, see Sec. 1104.

- <sup>1</sup> *Borst v. Simpson*, 90 Ala. 373, 7 So. 814; *Eskridge v. Glover*, (Ala.) 5 Stew. & P. 264, 26 Am. Dec. 344; *Jones v. Lewis*, 89 Ark. 368, 117 S. W. 561; *Brown v. San Francisco Sav. Union*, 134 Cal. 448, 66 P. 592; *Mitchel v. Gray*, 8 Cal. App. 423, 97 P. 160; *Leuschner v. Duff*, 7 Cal. App. 721, 95 P. 914; *Canty v. Brown*, 11 Cal. App. 487, 105 P. 428; *Gordon v. Darnell*, 5 Colo. 302; *Davis v. Ridelle*, 25 Colo. App. 162, 136 P. 551, mining option; *Smith v. Bateman*, 8 Colo. App. 336, 46 P. 213; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Goodman v. Spurlin*, 131 Ga. 588, 62 S. E. 1029; *Prior v. Hilton & D. Lumber Co.*, 141 Ga. 117, 80 S. E. 559; *Larmon v. Jordan*, 56 Ill. 204; *Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874; *Carter v. Love*, 206 Ill. 310, 69 N. E. 85; *O'Connor v. Harrison*, 132 Ill. App. 264; *Cortelyou v. Barnsdall*, 236 Ill. 138, 86 N. E. 200, s. c. 140 Ill. App. 163, oil lease—offer withdrawn before work commenced; *Murphy T. & Co. v. Reid*, 125 Ky. 585, 101 S. W. 964, 31 Ky. L. Rep. 176, 10 L. R. A. (N. S.) 195; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 A. S. R. 417; *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555; *Weiden v. Woodruff*, 38 Mich. 130; *Ward v. Davis*, 154 Mich. 413, 117 N. W. 897; *Ellsworth v. R. Ex. Co.*, 31 Minn. 543, 18 N. W. 822; *Moise v. Company*, 79 Neb. 124, 112 N. W. 372; *Houghwout v. Boisaubin*, 18 N. J. Eq. 315; *Quick v. Wheeler*, 78 N. Y. 300; *Hochster v. Baruch*, 5 Daly (N. Y.) 440, employment; *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 932; *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485; *Bosshardt & Wilson Co. v. Crescent Oil Co.*, 171 Pa. 109, 32 Atl. 1120; *Connor v. Renneker*, 25 S. C. 514; *Tucker v. Lawrence*, 56 Vt. 467; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Nelson v. Stephens*, 107 Wis. 136, 82 N. W. 163; *Cram v. Long*, 154 Wis. 13, 142 N. W. 267; *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997; *Frank v. Stanford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *Dickinson v. Dodds*, L. R. 2 Ch. Div. 463, 34 L. T. (N. S.) 607; *Stitt v. Huidekopers*, 17 Wall. 384, 21 L. Ed. 644, option and agency; *Davis v. Shaw*, 21 Ont. L. Rep. 474, 15 Ont. Wkly. Rep. 134, 16 id. 273; *Routledge v. Grant*, 4 Bing. 653, 15 E. C. L. 678, 130 Eng. Reprint 920; *Wheeling Creek etc. Co. v. Elder*, 170 Fed. 215; *Snow v. Nelson*, 113 Fed. 353; *Couch v. McCoy*, 138 Fed. 696, rule applies to option to purchase as well as option to sell.

notwithstanding a time is fixed within which the offer may be accepted,<sup>2</sup> and notwithstanding an express stipulation in the offer that it should not be withdrawn during that time.<sup>3</sup>

It is otherwise with an option contract. Such contract, as we have seen, is supported by a consideration and, by virtue of this fact, the optionor may not withdraw or revoke the option contract during its time limit.<sup>4</sup> And the same rule applies

<sup>2</sup> *Brown v. San Francisco Savings Union*, *supra*; *Walter G. Reese Co. v. House*, 162 Cal. 740, 124 P. 442; *Gordon v. Darnell*, 5 Colo. 302; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723, 724; *Larmon v. Jordan*, 56 Ill. 204; *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; *Boston etc. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224; *Head v. Diggon*, 3 M. & Ry. 97, 7 L. J. (O. S.) K. B. 36.

<sup>3</sup> An option not supported by a consideration may be withdrawn at any time before acceptance, notwithstanding it expressly stipulates it is "irrevocable," *Carton v. Wilson*, 13 Ont. L. Rep. 412; *Weaver v. Burr*, *supra*; see *Peck v. Freese*, 101 Mich. 321, 59 N. W. 600; *National Refining Co. v. Miller*, 1 S. D. 548, 47 N. W. 962.

The motive of the optionor for withdrawing is immaterial, *Noble v. Mann*, 32 Ky. L. Rep. 30, 105 S. W. 152.

<sup>4</sup> *Hanna v. Ingram*, 93 Ala. 482, 9 So. 621; *Taylor v. Newton*, 152 Ala. 459, 44 So. 583; *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 30 A. S. R. 47, 11 L. R. A. 148; *Linn v. McLean*, 80 Ala. 360; *Marsh v. Lott*, 8 Cal. App. 384, 97 P. 163; *Walter G. Reese Co. v. House*, 162 Cal. 740, 124 P. 442; *Copple v. Aigeltinger*, 167 Cal. 706, 140 P. 1073; *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541; *Larned v. Wentworth*, 114 Ga. 208, 39 S. E. 855; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Prior v. Hilton & D. L. Co.*, 141 Ga. 117, 80 S. E. 559; *Larmon v. Jordan*, 56 Ill. 204; *Seyferth v. Groves etc. R. R. Co.*, 217 Ill. 483, 75 N. E. 522, affirming 119 Ill. App. 275; *Souffrain v. McDonald*, 27 Ind. 269; *Herman v. Babcock*, 103 Ind. 461, 3 N. E. 142; *Murphy Thompson Co. v. Reed*, *supra*, *contra*; *Grabenhorst v. Nicodemus*, 42 Md. 236; *Solomon Mier & Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586, 12 Ann. Cas. 88; *New England Box Co. v. Prentiss*, 75 N. H. 246, 72 Atl. 826; *Myers v. Metzger*, 61 N. J. Eq. 522, 48 Atl. 1113; *Gaylord v. McCoy*, 161 N. C. 685, 77 S. E. 959; *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195; *Walker v. Bamberger*, 17 Utah 239, 54 P. 108; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881; *Baker v. Shaw*, 68 Wash. 99, 122 P. 611; *Watkins v.*

in those jurisdictions where a seal imports a consideration.<sup>5</sup> But to have this effect the consideration to support the option must be one separate and apart from that which upon election becomes the consideration for the agreement of sale.<sup>6</sup> In accordance with the rule, an option to purchase contained in a lease of the premises, or in any other contract which supplies a consideration for the option, is irrevocable during the time limit, on the theory that the consideration of the lease, or the other contract, supplies the consideration for the option.<sup>7</sup>

The rule with reference to option contracts is that, upon payment of the consideration for the option and the signing of the option contract, it becomes an executed contract for the sale of an

Robertson, 105 Va. 269, 54 S. E. 33, 115 A. S. R. 880, 5 L. R. A. (N. S.) 1194, 1 Ann. Cas. 986; Tibbs v. Zirkle, 55 W. Va. 49, 46 S. E. 701, 104 A. S. R. 977, 2 Ann. Cas. 421; Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150; Weaver v. Burr, *supra*.

<sup>4</sup> When the consideration consists of acts to be performed by the optionee, the optionor may withdraw at any time before performance, Corbett v. Cronkhite, 239 Ill. 9, 87 N. E. 874.

<sup>5</sup> McMillan v. Ames, 33 Minn. 257, 22 N. W. 612; Larmon v. Jordan, 56 Ill. 204; O'Brien v. Boland, 166 Mass. 481, 44 N. E. 602; Fuller v. Artman, 69 Hun. (N. Y.) 546, 2 N. Y. S. 13; see Secs. 332-333.

<sup>6</sup> Williams v. Graves, 7 Tex. Civ. App. 356, 26 S. W. 334; Tidball v. Challburg, 67 Neb. 524, 93 N. W. 679; see Secs. 322-323.

<sup>7</sup> Stanwood v. Kuhn, 132 Ill. 466, lease; Tilton v. Sterling C. Co., 28 Utah 173, 77 P. 758, 107 A. S. R. 689; Pearson v. Millard, 150 N. C. 303, 63 S. E. 1053, lease; Harper v. Runner, 85 Neb. 343, 123 N. W. 313, lease; Hall v. Abraham, 44 Ore. 477, 75 P. 882, licensee in possession of mine with option to purchase; Frank v. Stratford-Handcock, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571, lease; Souffrain v. McDonald, 27 Ind. 269; Tidball v. Challburg, 67 Neb. 524, 93 N. W. 679; Chas. J. Smith Co. v. Anderson, (N. J. Eq.) 95 Atl. 358; see Sec. 321.

option to purchase and thus is irrevocable by the optionor during the time limit.<sup>8</sup>

Of course, the option can not be withdrawn after a timely and proper election,<sup>9</sup> and the same rule obtains with reference to offers.<sup>10</sup>

Where the offer is made in writing to several persons as co-contractors and is without consideration, the person making the offer may withdraw it at any time before it has been accepted by all those to whom it was made.<sup>11</sup>

The rule applicable to the original offer or option also governs extensions.<sup>12</sup>

**SEC. 704. WITHDRAWAL OR REVOCATION. COMMUNICATION OF NOTICE NECESSARY.**—To make effective a withdrawal or revocation of an offer by the optionor, it is

<sup>8</sup> *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723.

Possession and improvements by optionee do not make option irrevocable by optionor, when possession not given by option, *Gordon v. Darnell*, 5 Colo. 302.

Lease and option to purchase separate and independent agreements; therefore, notice terminating lease does not defeat option, *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972.

Voting pool on shares and option to purchase as power coupled with interest and irrevocable, see *Boyer v. Nesbitt*, 227 Pa. 398, 76 Atl. 103.

<sup>9</sup> *Baker v. Shaw*, 68 Wash. 99, 122 P. 611; *Donahue v. Potter & George Co.*, 63 Neb. 128, 88 N. W. 171; see Sec. 871.

<sup>10</sup> *Prior v. Hilton & D. L. Co.*, 141 Ga. 117, 80 S. E. 559.

The rule does not apply to bilateral contracts, *Thompson v. Wilkinson*, (Okla.) 148 P. 177.

<sup>11</sup> *Burton v. Shotwell*, 76 Ky. (13 Bush.) 271; see Sec. 805.

<sup>12</sup> *Cummins v. Beavers*, 103 W. Va. 230, 48 S. E. 891, 106 A. S. R. 881, 1 Ann. Cas. 986; *Ganss v. Company*, 110 N. Y. S. 176, 125 App. Div. 760; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 A. S. R. 417; see Secs. 409, 859, 861.

necessary that notice thereof be communicated to the other party before acceptance by him,<sup>1</sup> and where the offer is made by mail, or telegraph, or by other carrier, the withdrawal takes effect, not from the moment of its dispatch, as in case of communication of acceptance of an offer, but from the moment of its receipt by the party to whom the offer is made.<sup>2</sup> Thus, a person who has received an offer by post, or telegraph, and has posted or telegraphed his acceptance, has thereby created a binding contract, though notice of the revocation of the offer had been posted, or the wire filed for transmission to him, before his acceptance.<sup>3</sup>

There are decisions holding that notice of withdrawal is unnecessary, but these decisions stand opposed to the weight of judicial authority. Thus, *Cooke v. Oxley*<sup>4</sup> is often cited to the proposition

<sup>1</sup> *Smith v. Russell*, 20 Colo. App. 554, 80 P. 474; see *Brown v. San Francisco Sav. Union*, 134 Cal. 448, 66 P. 592; *Clark v. Harmer*, 5 App. D. C. 114, option to redeliver.

<sup>2</sup> *Byrne v. Van Tienhoven*, 5 C. P. Div. 344, 49 L. R. C. P. 316, 42 L. T. (N. S.) 371, 44 J. P. 667; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28, letters crossing in mail; unless, of course, the option provides otherwise, or where the answer is required by return post, *Maclay v. Harvey*, 90 Ill. 525, 32 Am. Dec. 35; *Bernard v. Torrance*, 5 Gill. & J. (Md.) 383; *Taylor v. Rennie*, 35 Barb. 272, 22 How. Pr. 101; *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Dec. 775.

<sup>3</sup> *Patrick v. Bowman*, 149 U. S. 411, 37 L. Ed. 790, 13 Sup. Ct. 811; *Kempner v. Cohn*, *supra*; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511.

See *Linn v. McLean*, 80 Ala. 360, acceptance can not be retracted after deposit in mail. The acceptance is good though the letter not received by the proposer, *Washburn v. Fletcher*, 42 Wis. 152; see Sec. 818-819.

<sup>4</sup> *Cooke v. Oxley*, 3 Term. Rep. 653, 100 Eng. Reprint 785.

In *Boston etc. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224, it is said the *Cooke* case is inaccurately reported and that, in fact, there was no acceptance. The *Cooke* decision was not followed. See, also, *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 A. S. R. 341.

that notice of withdrawal is unnecessary. It is doubtful, however, if the decision goes that far, but if it does, it is not in accord with the law either in England or America at the present time.<sup>5</sup> All this case holds is that a party who gives time to another to accept or reject a proposal, is not bound to wait until the time expires, but in the absence of a previous acceptance, may withdraw the proposal before the expiration of the time.<sup>6</sup>

Where the option is supported by a consideration but does not expressly fix a definite time limit, the option may not be revoked by the optionor during

<sup>5</sup> Smith v. Russell, 20 Colo. App. 554, 80 P. 474; Frank v. Stratford-Handcock, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571.

In Noble v. Mann, 32 Ky. L. Rep. 30, 105 S. W. 152, it was said a sale and conveyance by the optionor was a withdrawal, although the optionee had no notice of its "terms." See Collison v. Lettsom, 6 Taunt. 224, 2 Marsh 1, 128 Eng. Reprint 1020.

Recording deed of conveyance of optioned property is not notice to optionee of revocation, Smith v. Russell, 20 Colo. App. 554, 80 P. 474.

In McCauley v. Coe, 150 Ill. 311, 37 N. E. 232, the deed of the premises, their subdivision, and suit to remove cloud, were after the expiration of the fixed time limit.

Sprague v. Schotte, 48 Ore. 609, 87 P. 1046, turned on the point that the defendant was a purchaser with notice of the option and that, therefore, a sale to him was a revocation in law, although the optionee had not actual notice of the sale or of the revocation.

<sup>6</sup> Stevenson v. McLean, 5 Q. B. D. 346, and holding "that an uncommunicated revocation is for all practical purposes and in point of law, no revocation at all." See, also, Kempner v. Cohn, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775.

The decisions cited involved pure offers, not option contracts. The latter may not be withdrawn during the time limit. The rule of revocation has no application. Acceptance of offers as constituting a contract is founded on the presumption that the offeree renews his offer every moment of the time limit, or, if no time be limited, then for a reasonable time, and that the offeree may accept at any of the "moments" unless prior to the expiration of the time the offerer does some act inconsistent with the presumption of "renewals." Where this occurs, the *aggregatio mentium* necessary to a contract cannot arise, see Larmon v. Jordan, 56 Ill. 204.



what would be considered, upon all of the facts, a reasonable time for its duration, in accordance with the rule that where the time limit is not prescribed by the option the law fixes a reasonable time.<sup>7</sup> It is said, however, in one case<sup>8</sup> that it is only when the limitation is fixed and definite that the right of revocation is suspended, but in the case referred to there was a fixed time limit and the question before the court was concerning the right of a lessor to revoke an option in a lease after the expiration of the term of the lease, a right which the lessor undoubtedly had, not, however because the time limit was or was not fixed, but because the express time limit had expired.

When acceptance and withdrawal under an offer are simultaneous, it seems the withdrawal will be given precedence over the acceptance and, consequently, no contract will be raised by such an acceptance.<sup>9</sup> This rule, however, does not apply to

<sup>7</sup> See *Larmon v. Jordan*, 56 Ill. 204; *Bowen v. McCarthy*, 85 Mich. 26, 48 N. W. 155. But notice of withdrawal is not necessary in such cases either as to offers or options. The option expires by efflux of a reasonable time, see *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485, 624. It would seem to be otherwise where the option is indeterminate as to time and takes the form of an escrow, in which case reasonable notice is necessary, *Stone v. Snell*, 77 Neb. 441, 109 N. W. 750; and probably in all cases of indeterminate time when the optionor desires to foreclose the question of reasonable time.

Commencement of action by optionor to recover the optioned property is sufficient notice of termination of option when an indefinite extension has been given, *Montgomery v. Waldeck*, 2 Alaska 581.

<sup>8</sup> *McCauley v. Coe*, 150 Ill. 311, 37 N. E. 232.

In *Minn. etc. Ry. Co. v. Columbus etc. Co.*, 119 U. S. 149, 30 L. Ed. 376, 7 Sup. Ct. 168, there was no consideration to support the offer. The acceptance varied from the offer and was withdrawn before the expiration of the time limit.

<sup>9</sup> *Head v. Diggon*, 3 M. & Ry. 97, 7 L. J. (O. S.) K. B. 36; see *Storch v. Duhnke*, 76 Minn. 521, 79 N. W. 533.

an option supported by a consideration, since, under the option, the right of withdrawal does not arise at all. The option expires by lapse of the stipulated time, if there is no seasonable and proper election.<sup>10</sup>

SEC. 705. WHAT CONSTITUTES REVOCATION. NOTICE THEREOF.—If the option is without consideration, that is, a mere offer, any overt act on the part of the optionor clearly showing his intention to revoke, is sufficient to work a revocation, if the optionee has knowledge of such act prior to his acceptance.<sup>1</sup>

What acts are sufficient to constitute notice is one of fact and, of course, will depend upon the particular case. Where a deed was deposited with a bank on an understanding that it was to be delivered to the grantee on his payment of the consideration within a specified time, notice to the bank withdrawing the offer did not amount to notice to the grantee.<sup>2</sup> Neither is the record of a deed under the recording acts constructive notice to the offeree of a revocation.<sup>2</sup>

<sup>10</sup> See Sec. 707.

<sup>1</sup> See *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 A. S. R. 417; *Connor v. Renneker*, 25 S. C. 514; *Ellsworth v. Minn. R. Ex. Co.*, 31 Minn. 543, 18 N. W. 882; *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va. 84, 34 S. E. 923, giving second lease and possession thereunder.

But making a similar offer to a third person is not a withdrawal, *Prior v. Hilton & D. L. Co.*, 141 Ga. 117, 80 S. E. 559, 560.

Where the alleged purchaser knew nothing of the offer to convey land, a withdrawal is effective without notice to him, *Brown v. Farmers & M. Nat'l Bank*, (Kan.) 147 P. 537.

<sup>2</sup> *Smith v. Russell*, 20 Colo. App. 554, 80 P. 474.

In an Illinois case,<sup>3</sup> it is held the sale and conveyance of the premises, the subdivision thereof, and the institution of a suit to remove the *option* as a cloud, evidenced an intention on the part of the offerer to revoke and, in effect, that such acts did constitute a revocation. This statement of the rule is undoubtedly correct if such facts are brought to the knowledge of the offeree. In the cited case the option was contained in a lease of the premises. The lessee mortgaged his interest in the lease, but neither the lessee nor the mortgagee elected to purchase during the term. The lessor, about two months after the expiration of the term, conveyed the property to another and subsequently repurchased and subdivided it, and then brought suit against the mortgagee to remove the cloud on his title. The court held that if the right to exercise the option continued after the expiration of the term, it could be withdrawn by the lessor at any time, and that the above acts on his part were a revocation and cut off the rights of the lessee and mortgagee.

The decisions are not always clear on the point whether there is a revocation, if the sale and conveyance, or other act, was not brought to the knowledge of the offeree;<sup>4</sup> but what we believe to be the

<sup>3</sup> McCauley v. Coe, 150 Ill. 311, 37 N. E. 232, the option was withdrawn by expiration of the time limit; See. 707.

<sup>4</sup> See Larmon v. Jordan, 56 Ill. 204; Sprague v. Schotte, 48 Ore. 609, 87 P. 1046.

Noble v. Mann, 32 Ky. L. Rep. 30, 105 S. W. 152, is not clear on the facts reported, but it is implied that offeree had knowledge of the sale if not of its "terms," besides there was no actual consideration.

Beckman v. Waters, 3 Cal. App. 734, 86 P. 997, holds that suit to quiet title against *optionee* is sufficient notice of termination of an indefinite extension of *option*.

established rule as to sales and conveyance is that a sale and conveyance of the premises, by the offerer, amounts to a revocation only where the sale is made in good faith and for a valuable consideration, and such sale is brought to the knowledge of the offeree prior to his acceptance.<sup>5</sup> It is not meant, however, by the above statement, that a revocation can be made only by a sale and conveyance. The general rule, as first above stated, is that a revocation can be worked by any act of the offerer showing his intention to revoke, of which act the offeree has notice, before acceptance.

SEC. 706. SAME. CASES.—Refusal to deliver books is a retraction of the offer to sell them.<sup>1</sup> A statement by the optionor that the “deal is off,”

<sup>4</sup> The apparent conflict in some of the decisions as to the necessity of notice to the offeree may be removed, at least partially, by keeping in mind that the revocation, unless otherwise provided by the offer, may be a formal withdrawal or one implied from acts.

It should be observed, also, that the right of withdrawal or of revocation is peculiar to offers, or so-called options unsupported by consideration or not under seal. There is no such thing as withdrawal or revocation of a real option contract. The subject is confused to some extent by the use of the word “option” in the sense of “offer,” or *vice versa*.

<sup>5</sup> *Dickinson v. Dodds*, L. R., 2 Ch. Div. 463, 34 L. T. (N. S.) 607; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 A. S. R. 417; *Davis v. Shaw*, 21 Ont. L. Rep. 474, 15 Ont. Wkly. Rep. 134, 16 Wkly. Rep. 273.

Giving second *option* is not revocation of first *option*, *Ward v. Davis*, 154 Mich. 413, 117 N. W. 897.

<sup>1</sup> *Craig v. Harper*, 3 Cush. (Mass.) 158. The word “option” in the text is taken from the decisions cited, and means an offer, or a so-called option, without consideration, unless the context shows otherwise.

and his refusal to sign the deed, is a revocation.<sup>2</sup> A contract reciting that on payment of two notes at maturity, the maker shall have the exclusive option to purchase land at a fixed price, was rescinded by the payee notifying the maker that his right to the option was terminated by his failure to pay the second note.<sup>3</sup>

Where the option to purchase is contained in a lease, the mere sending of a letter by the lessor stating that the balance of the rent in arrears must be paid by a certain date, and asking concerning the lessee's desire to continue, is not a forfeiture of the lease or of the option to purchase.<sup>4</sup>

Demand of possession by a vendor made pursuant to a provision in the contract of sale, is equivalent to the exercise by him of the option to forfeit the contract.<sup>5</sup>

Refusal of the optionor to perform, before any demand is made on him by the optionee, is not a renunciation of the option so as to determine the optionee's rights where the option is based on a valid consideration.<sup>6</sup>

In accordance with the rule that the withdrawal of the offer must be brought to the knowledge of the offeree, it is not sufficient to leave a written notice with an employee of the offeree who had no authority to receive it.<sup>7</sup>

<sup>2</sup> Hay v. Mason, 141 Cal. 722, 75 P. 300.

<sup>3</sup> Title Ins. & T. Co. v. King L. & I. Co., 19 Cal. App. 458, 126 P. 372.

<sup>4</sup> Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118.

<sup>5</sup> Thiry v. Edson, 129 Ill. App. 128.

<sup>6</sup> Solomon Mier Co. v. Hadden, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586, 12 Ann. Cas. 88.

<sup>7</sup> Gross v. Arnold, 177 Ill. 575, 52 N. E. 867.

18—Option Contracts.

**SEC. 707. EXPIRATION OF TIME LIMIT.**

—The right of the optionee to elect terminates upon expiration of the time limit where that is expressly fixed by the contract, or upon the expiration of a reasonable time, where no time is expressly specified.<sup>1</sup> This rule applies also to a mere offer, that is, an offer not supported by a consideration. The rule is stated by the Supreme Court of the United States as follows: When an offer is made for a time limited in the offer itself, no acceptance afterwards will make it binding; any offer without consideration may be withdrawn, at any time before acceptance, and an offer which, in its terms, limits the time of acceptance is withdrawn by expiration of the time.<sup>2</sup>

Where the time limit is expressly fixed by the terms of the option contract no formal notice of withdrawal is necessary.<sup>3</sup> The offer or option lapses by efflux of time, and, in the absence of a

<sup>1</sup> See Secs. 856 *et seq.*; *Rees v. Pellow*, 97 Fed. 167, 38 C. C. A. 94; *Stewart v. Gardner*, 152 Ky. 120, 153 S. W. 3; *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485, without notice; *Standard Box Co. v. Mut. Bis-cuit Co.*, 10 Cal. App. 746, 103 P. 938.

*Bowen v. McCarthy*, 85 Mich. 26, 48 N. W. 155, cash payment after expiration of reasonable time, insufficient, though offer not withdrawn.

<sup>2</sup> *Waterman v. Banks*, 144 U. S. 394, 36 L. Ed. 479, 12 S. Ct. 646; also *Minn. etc. Ry. Co. v. Columbus etc. Co.*, 119 U. S. 149, 30 L. Ed. 376, 7 S. Ct. 168; *Richardson v. Hardwick*, 106 U. S. 252, 27 L. Ed. 145, 1 S. Ct. 213.

<sup>3</sup> *Barney v. Yazoo Delta L. Co.*, 179 Ind. 337, 101 N. E. 96; *Cummings v. Town etc. Co.*, 86 Wis. 382, 57 N. W. 43; *Nelson v. Stephens*, 107 Wis. 136, 82 N. W. 163; *Womaek v. Coleman*, 92 Minn. 328, 100 N. W. 9; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; *Commercial Bank v. Weldon*, 148 Cal. 601, 84 P. 171; *Paterson v. Houghton*, 49 Manitoba 168.

timely election, the rights of the optionee are at an end.<sup>4</sup>

SEC. 708. RESERVATION OF RIGHT TO TERMINATE.—Where an option in a lease contains a clause giving the optionee the right to terminate the lease, and provides that the termination of the lease shall end the option right, failure to pay the rentals under the lease cuts off all rights of the optionee under the option.<sup>1</sup> So, where the option gives the optionee the right to investigate and determine the sufficiency and practicability of a water supply, notice to the optionor that the optionee has determined that the water supply is insufficient and not practicable, ends the option agreement.<sup>2</sup>

Leases frequently contain a provision giving the lessor the right to terminate the lease and the option contained therein, in case of sale of the premises by the lessor. To entitle the lessor to such right the sale must be *bona fide*. Accordingly, a gift of the property by the lessor to her son does not terminate the rights of the lessee.<sup>3</sup> And it

<sup>4</sup> Spafford v. Hedges, 231 Ill. 140, 83 N. E. 129, acceptance fifteen years after expiration of time limit; Moore v. Allen, 109 Minn. 139, 123 N. W. 292; Hay v. Mason, 141 Cal. 722, 75 P. 300; Canty v. Brown, 11 Cal. App. 487, 105 P. 428.

<sup>1</sup> Ober v. Brooks, 162 Mass. 102, 38 N. E. 429.

<sup>2</sup> Gard v. Thompson, 21 Idaho 485, 123 P. 497.

<sup>3</sup> Knowles v. Hull, 97 Mass. 206; note 1, Sec. 834; Ogle v. Hubbel, 1 Cal. App. 357, 82 P. 217.

See, however, Elston v. Schilling, 42 N. Y. 79, lease with option to renew, holding a conveyance by way of advancement was a "disposal" and therefore a termination of the option right. Also, Ewing v. Miles, 12 Tex. Civ. App. 19, 33 S. W. 235, holding sale by one of several lessees did not defeat right of renewal.

seems the lessor may exercise the right to cancel a lease notwithstanding he no longer has the title, it having been conveyed to the purchaser.<sup>4</sup>

Where a lease reserves to the lessor the right to sell the leased lands and to terminate the lease, at the end of any rental year, on six months' notice, and gives the lessee the privilege of buying at a price to be set by the lessor, and which might be offered for the land by a third party, the lessee is given the option to purchase only in case the lessor elects to terminate the lease by making a sale.<sup>5</sup> If, after notice of sale, or of an offer by a third person, the optionee makes no election to purchase, his right to do so is at an end,<sup>6</sup> and this is true even where the term of the lease had not expired, the circumstances showing the refusal was absolute and definite.<sup>7</sup>

SEC. 709. DEATH OR INSANITY. BANKRUPTCY.—The rule of law with reference to mere offers is that the death or insanity of either party before acceptance causes the offer to lapse.<sup>1</sup>

<sup>4</sup> *Lewis v. Agoure*, 8 Cal. App. 146, 96 P. 327.

<sup>5</sup> *Devitt v. Kaufman County*, 27 Tex. Civ. App. 332, 66 S. W. 224.

<sup>6</sup> *Harding v. Gibbs*, 125 Ill. 85, 17 N. E. 60, 8 A. S. R. 345.

Clause in oil and mining lease permitting either party to terminate and providing that thereafter lease shall be null and void, etc., *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

<sup>7</sup> *Weber v. Grand Lodge*, 169 Fed. 522, 95 C. C. A. 20, 171 Fed. 839, 96 C. C. A. 410, in this case the lessee sought to take advantage of the lessor's immediate renting of the premises to third parties.

<sup>1</sup> *Wallace v. Townsend*, 43 Ohio St. 537, 3 N. E. 601; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 A. S. R. 417; see *Newton v. Newton*, 11 R. I. 390, 23 Am. Rep. 476; *Sutherland v. Parkins*, 75 Ill. 338; *Dickinson v. Dodds*, L. R., 2 Ch. Div. 463, 34 L. T. (N. S.) 607; *Riner v. Husted's Estate*, 13 Colo. App. 523, 58 P. 793.



This rule, however, does not apply to a real option contract. The distinction is placed on the ground that if the intestate (optionor) could not have revoked the option during his life time, his heirs or legal representatives have no greater right, and where an option is supported by a consideration and, therefore, not revocable during its time limit, it is not revoked by the death of the optionor.<sup>2</sup> The death of the optionee does not discharge an option supported by a consideration, unless, of course, under the rule of assignability, the option right does not survive.<sup>3</sup>

The bankruptcy, before the time arrives, of one who has promised to return the amount paid for corporate stock, if it is surrendered within a certain time, does not prevent the claim upon the contract from being a fixed liability, absolutely owing, at the time of the bankruptcy, and is provable under the bankruptcy act, since the promisee may treat the bankruptcy as a repudiation of

<sup>2</sup> *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997; *Rockland etc. Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, Ann. Cas. 1913B, 62, lease, bound heirs, etc., of parties.

See *Prince v. Robinson*, 14 Fed. 631; *State v. Worthington*, 7 Ohio 171, alternation of contract; *Buckwalter v. Klein*, 5 Ohio Dec. 55, lease and option; *Ripley v. Waterworth*, 7 Ves. Jr. 425, 32 Eng. Reprint 172.

Case where optionee became insane after notice by optionor to him under agreement by which one partner gave the other the right of "pre-emption" on his share, *Rowlands v. Evans*, 31 L. J. Ch. 265, 30 Beav. 302, 8 Jur. (N. S.) 88, 54 Eng. Reprint 905.

<sup>3</sup> See Secs. 604 *et seq.*; see *Parker v. Seeley*, 56 N. J. Eq. 110, 38 Atl. 280, devisee and optionee under will died and it was held that as the trustee under the will knew it was his intention to elect, there was an election, though never formally made.

liability and immediately bring an action for damages.<sup>4</sup>

### SEC. 710. ABANDONMENT. SURRENDER.

—Where the optionee, before the expiration of the time limit, surrenders or abandons his rights under the option, the optionor undoubtedly has the right to consider the option contract at an end,<sup>1</sup> and it follows that thereafter the optionee may not exercise his right to purchase,<sup>2</sup> and has no claim for damages arising out of the option,<sup>3</sup> and is estopped

<sup>4</sup> *In re Neff*, 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349, citing *In re Swift*, 112 Fed. 315, 50 C. C. A. 264; *In re Pettingill*, 137 Fed. 147.

The trustee in bankruptcy is bound by the contracts of the bankrupt in the form of sale and return and as to purchases on approval, *In re Miller v. Brown*, 135 Fed. 868; *In re Nicholas*, 122 Fed. 299; *In re Paper Co.*, 147 Fed. 858.

<sup>1</sup> *Hopwood v. McCausland*, 120 Iowa 218, 94 N. W. 469; *Sandberg v. Light*, 55 Wash. 189, 104 P. 205; *Meidling v. Trefz*, 48 N. J. Eq. 638, 23 Atl. 824, optionor was led to believe optionee had abandoned; *Race v. Groves*, 43 N. J. Eq. 284, 7 Atl. 667, estopped; *Weber v. Lodge*, 169 Fed. 522, 95 C. C. A. 20, s. c. 171 Fed. 839, 96 C. C. A. 410; *Kruegel v. Berry*, 75 Tex. 230, 9 S. W. 863; *Williams v. Williams*, 17 Beav. 213, 51 Eng. Reprint 1015, 9 Eng. Rul. Cas. 493; *Gathright v. H. M. Byllesby & Co.*, 154 Ky. 106, 157 S. W. 45, by ordinance before expiration.

Waiver or abandonment may be manifested by words or acts, but all the attending facts must show an intentional relinquishment, *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413.

What amounts to assent to surrender of leased premises, *Hayes v. Goldman*, 71 Ark. 251, 72 S. W. 563.

Refusal by optionor to sell may be treated as an abandonment, *Montgomery Gas Light Co. v. City*, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

<sup>2</sup> *Sandberg v. Light*, 55 Wash. 189, 104 P. 205; see *Davis v. Petty*, 147 Mo. 374, 48 S. W. 944; *Eagle v. Pettus*, 109 Ark. 310, 159 S. W. 1116.

<sup>3</sup> *Darragh v. Vicknair*, 126 La. 171, 52 So. 264, for failure to make title.

to ask for specific performance.<sup>4</sup> Just what acts have such effect are relative to each case and often afford sufficient grounds to invoke the rule of estoppel. Thus, an optionee told the optionor some days before the expiration of the time limit, that he could not raise the money to pay the price, and that unless the optionor should grant an extension, the option would be abandoned. The optionor refused to grant the extension and, in reliance on the statement, made valuable improvements and leased the land, and it was held the optionee was estopped.<sup>2</sup> Where the holder of an option to purchase land upon as low terms as should be offered by any other person, refused to purchase at the price offered by another, he could not, after a sale was made upon such offer, maintain a bill for specific performance and cancellation of the deed to the purchaser.<sup>5</sup>

Payment of rent by a tenant after exercising his option, where the payment is compulsory under the terms of the agreement, does not work an abandonment of the option.<sup>6</sup>

There is a surrender of the option to purchase a mine where the optionee signifies his intention to surrender it and to forfeit his rights, and the optionor thereupon takes and continues to hold possession.<sup>7</sup> But an option in a lease is not surren-

<sup>4</sup> *Milmoe v. Murphy*, 65 N. J. Eq. 767, 56 Atl. 292; *Kentucky Iron etc. Co. v. Adams*, 32 Ky. L. Rep. 823, 106 S. W. 1198; *May v. Getty*, 140 N. C. 310, 53 S. E. 75; see Sec. 1248, note 8.

<sup>5</sup> *Cummings v. Nielson*, 42 Utah 157, 129 P. 619.

<sup>6</sup> *Walshe v. Endom*, 129 La. 148, 55 So. 744.

<sup>7</sup> *K. P. Min. Co. v. Jacobson*, 30 Utah 115, 83 P. 728, 4 L. R. A. (N. S.) 755.

dered by the fact that the optionee takes a new lease before the expiration of the term of the old one, which he still retains, even though the new lease did not contain the option clause, the purpose of the new lease being, as it would seem, merely to add some additional restrictive clauses.<sup>8</sup>

The question of abandonment is one of fact,<sup>9</sup> but what facts amount to abandonment is a question of law.<sup>10</sup> Proof of conduct constituting abandonment must be positive, unequivocal, and inconsistent with the option contract.<sup>11</sup> The burden of proof is on the optionor.<sup>12</sup>

<sup>8</sup> *Lester Agricultural Works v. Selby*, 68 N. J. Eq. 271, 59 Atl. 247; also *Wade v. So. Penn. Oil Co.*, 45 W. Va. 380, 32 S. E. 169.

See *Conner v. Clapp*, 37 Wash. 299, 79 P. 929, holding option not surrendered by arrangement to make option subject to mortgage given by optionor.

*Rice v. Lincoln etc. R. Co.*, 88 Neb. 307, 129 N. W. 425, holding option on additional land not surrendered by completing purchase for other land, though option and agreement of purchase were in same instrument.

<sup>9</sup> *Cambria Iron Co. v. Leidy*, 226 Pa. 122, 75 Atl. 186; *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413; *Eagle v. Pettus*, 109 Ark. 310, 159 S. W. 1116.

<sup>10</sup> *Sitterding v. Grizzard*, 114 N. C. 108, 19 S. E. 92.

<sup>11</sup> *Sitterding v. Grizzard*, 114 N. C. 108, 19 S. E. 92; see *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25; *Victor Safe Co. v. O'Neil*, 48 Wash. 176, 93 P. 214.

<sup>12</sup> *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413.

Abandonment of oil and mineral lease by failure to develop and operate so as to yield royalty, *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558, 27 Ky. L. Rep. 724; *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. 255, authority of agent to abandon.

A rescission by express words is called "surrender in fact" and when by acts a "surrender in law." Parol surrender of oil lease before possession is taken is not within the Statute of Frauds, *Hooks v. Forst*, 165 Pa. 238, 30 Atl. 846; power of president of corporation lessee to surrender lease and option, *Lester Agricultural Chemical Works v. Selby*, *supra*.

SEC. 711. RENUNCIATION.—It is elementary that renunciation of a contract by one party before time of performance has arrived, does not discharge the contract unless the other party elects to deem it such.<sup>1</sup> The renunciation must be positive and unqualified, and have reference to matters the non-performance of which, at the time called for, would operate as a discharge.<sup>2</sup>

Refusal of the optionor to perform before any demand is made on him by the optionee, is not a renunciation of the option, nor does it determine the rights of the optionee where the option is based on a valid consideration moving to the optionor.<sup>3</sup> An offer of a lesser price for land by the optionee, is not a refusal to take at the option price so as to terminate the option.<sup>4</sup>

<sup>1</sup> And, of course, the party renouncing will not be discharged without the consent of the other party, *Main St. & A. P. R. Co. v. Los Angeles Traction Co.*, 129 Cal. 301, 61 P. 937.

<sup>2</sup> An unqualified and positive refusal to perform a contract, though the performance thereof is not yet due, may, if the renunciation goes to the whole contract, be treated as a complete breach, which will entitle the injured party to bring his action at once, *Roehm v. Horst*, 178 U. S. 1, 44 L. Ed. 953, 20 S. Ct. 780, following *Hochester v. De La Tour*, 2 El. & Bl. 678, 6 Eng. Rul. Cases 576; see Sec. 702.

The effect of a renunciation is to dispense with an offer to perform if the renunciation is not retracted before the time of performance arrives, *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760, (conflicting decisions reviewed).

But it is held the rule does not apply to conditions precedent, *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12, 63 A. S. R. 193, and it is believed the renunciation by an optionor does not dispense with election by the optionee desiring to enforce the option. See Secs. 868 *et seq.*

<sup>3</sup> *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586, 12 Ann. Cas. 88.

<sup>4</sup> *Baxter v. Calhoun*, 222 Fed. 111.

SEC. 712. RESCISSION.—A contract may be rescinded by mutual agreement of the parties, and it may also be rescinded by one of the parties where his assent thereto was not free, and also, in certain other cases, where the consideration becomes entirely void or partly or wholly fails.

Technically speaking, rescission is the unmaking of a contract, and its legal effect is to restore each party to the condition in which he was before the contract was made, so far as that is possible, and to leave the parties without any rights growing out of the contract itself. But there are certain acts on the part of one of the parties which give the other the right to terminate and end the contract, and still leave the contract alive for the purpose of fixing the rights and liabilities of the respective parties.<sup>1</sup> Abandonment, surrender, and breach of contract are such acts. The law on this branch of the subject has already been considered. The decisions of the court involving rescission follow.

A mere request by one of the parties to the option, for an alteration or modification of an accepted option, is not a breach thereof giving a right of rescission thereof or an action thereon.<sup>2</sup>

Where defendants have only an option to purchase certain land, and agree to convey to plaintiff on February 1, 1903, under a contract of which time was the essence, and defendants' vendors were not bound to convey to them or surrender until March 1, 1903, defendants having no title to the property on February 1, 1903, and being unable

<sup>1</sup> Clark v. American Developing & M. Co., 28 Mont. 468, 72 P. 978, 980.

<sup>2</sup> Turner v. McCormick, 56 W. Va. 161, 49 S. E. 28, 107 A. S. R. 904, 67 L. R. A. 853.

to convey on that date, their breach of the contract entitled the plaintiff to rescission.<sup>3</sup>

The fact that after the optionee gave notice of its intention to purchase water works the source of water went dry, did not entitle the optionee to rescind.<sup>4</sup>

Where an agreement for the sale of coal provides that the option should last only for nine months, and, on the last day of the nine months, the optionor tenders a deed and demands the purchase money, the delay of the optionee in paying the price will not enable the optionor to rescind when the optionee objects on the claim that there are defects in the title.<sup>5</sup> But the optionee is not entitled to rescind on the ground that the title to the property was unmarketable prior to the expiration of the option time, without offering to make a cash payment of the price as required by the option, to complete the purchase.<sup>6</sup>

Where both parties treat the option as in force after the expiration of the time limit, before either party can declare the contract at an end and put the other party in default, he must have performed and notified the other party to perform or that the

<sup>3</sup> *Primm v. Wise*, 126 Iowa 528, 102 N. W. 427.

*Burks v. Davies*, 85 Cal. 110, 24 P. 613, 20 A. S. R. 213, purchaser may rescind on learning of default in title (owner had option only) when purchaser fails to perform.

<sup>4</sup> *Cherryvale Water Co. v. City*, 65 Kan. 219, 69 P. 176, the court held the city was estopped on the facts.

<sup>5</sup> *Penn. Min. Co. v. Smith*, 210 Pa. 49, 59 Atl. 316; there were encumbrances on this property.

<sup>6</sup> *Winter v. Bostwick*, 172 Fed. 285.

contract would be rescinded.<sup>7</sup> Mere failure to pay the purchase money according to the terms of the agreement will not authorize a suit by the vendor to rescind.<sup>7</sup>

When, after the price of the land became due and before it was paid, the land advanced greatly in value, the vendors can not rescind the contract without notice of their intention to do so, if payment is delayed, nor without returning payments which have been advanced.<sup>8</sup>

A contract giving the option to purchase mining property, can not be rescinded for fraud because of erroneous statements made by the seller as to the quantity of ore in the property or concerning the title, when the purchasers were to take possession of and operate the property for several months before the option expired, where the statements were made in good faith and expressed the honest opinion of the optionors, who were not lawyers and had little knowledge of practical mining.<sup>9</sup>

That a seller, in a contract containing an option to purchase personal property, failed to object to conveying until advised of his rights under the contract, did not prevent him from cancelling the

<sup>7</sup> *Kessler v. Pruitt*, 14 Idaho 175, 93 P. 965; *Vance v. Newman*, 72 Ark. 359, 80 S. W. 574, 105 A. S. R. 42, without notice and return of payments made.

<sup>8</sup> *Vance v. Newman*, 72 Ark. 359, 80 S. W. 574, 105 A. S. R. 42; see *Kessler v. Pruitt*, 14 Idaho 175, 93 P. 965.

<sup>9</sup> *Winter v. Bostwick*, 172 Fed. 285; see *Morgan County Coal Co. v. Halderman*, 254 Mo. 596, 163 S. W. 828.

*Smith v. Detroit etc. Gold Mining Co.*, 17 S. D. 413, 97 N. W. 17, holding optionee not entitled to rescind after demonstrating the unproductiveness of the mine, though there were mistakes as to title and boundary lines.



contract for failure of the buyer to exercise the option within the time stipulated.<sup>10</sup> Delay of the optionee for two and one-half years to exercise the option, entitles the optionor to cancellation, although deed was to be made on fifty days' notice, and first payment was to be made fifty days thereafter.<sup>11</sup>

Where an option was taken on a parcel of land which both parties believed contained four hundred acres, when in fact it contained only two hundred twenty-four acres, the optionee was entitled to rescind for mutual mistake.<sup>12</sup>

<sup>10</sup> Neill v. Hitchman, 201 Pa. 207, 50 Atl. 987.

<sup>11</sup> Swank v. Fretts, 209 Pa. 625, 59 Atl. 264.

<sup>12</sup> McCrea v. Hinkson, 65 Ore. 132, 131 P. 1025.

Facts necessary to be alleged, *Swanston v. Clark*, 153 Cal. 300, 95 P. 1117.

Notice held not to amount to rescission, *Moore v. Beiseker*, 147 Fed. 367, 77 C. C. A. 545.

When seller of stock agrees to repurchase, within a certain time, at a specified price, purchaser is given the right to rescind, *Hudson v. Seeley*, 19 Cal. App. 213, 124 P. 1051.

Agreement to rescind option without consideration, *Jarvis v. Sutton*, 3 Ind. 289.

Not necessary to put other party in default to be entitled to rescind, *Jennings etc. Syndicate v. Oil Company*, 119 La. 793, 44 So. 481.

Option rescinded on notice by failure to pay last of two notes, the contract providing that optionee should have option to purchase land if both notes were paid, *Title Ins. & T. Co. v. King L. & I. Co.*, 19 Cal. App. 458, 126 P. 372.

Not necessary to return carcass of pony optioned, *Lyons v. Stills*, 97 Tenn. 514, 37 S. W. 280, or tender identical shares of stock, *Schultz v. O'Rourke*, 18 Mont. 418, 45 P. 634.

The fact that the purchaser of stock gave the seller a written option on the stock for four months does not show, as a matter of law, that the former oral agreement to repurchase was rescinded or merged in the new bargain, *Corey v. Woodin*, 195 Mass. 464, 81 N. E. 260.

**SEC. 713. SUBSTITUTION OF NEW CONTRACT OR OF NEW TERM.**—The parties to an option contract may, by agreement between them, substitute a new contract, or insert a new stipulation in the old contract. In the former case, an entirely new contract is made. In the latter, a new term or stipulation is introduced into the old contract. Extension of time expressly fixed by the original option contract within which to elect is, according to some cases, the substitution of a new term.<sup>1</sup> A Michigan case furnishes an example of the substitution of a new contract. An option for the purchase of land was made by correspondence between parties residing at different places. The option was accepted by the optionees and due notice given that they were ready to take a deed of conveyance. The optionors prepared the deed and one of them took it to the place of residence of the optionees to consummate the agreement. The optionees then asked for 10 days' further time within which to procure the money. By arrangement between them the deed was left in escrow with a third party to be delivered upon payment of the money, and no further steps were taken until the last day provided by the original option, and it was held the original option was superseded by the subsequent agreement, and that the optionees lost their right to purchase by their failure to comply with that agreement.<sup>2</sup>

<sup>1</sup> See, as to extension, Secs. 334, 412-413, 859-861.

New contract held to be an extension only of the original option.  
*Standiford v. Kloman*, 234 Pa. 443, 83 Atl. 311.

<sup>2</sup> *Cleaves v. Walsh*, 125 Mich. 638, 84 N. W. 1108.

An option to assign certain judgments was held superseded by a subsequent contract entered into by the parties after the time for the performance of the option had expired without election, the latter contract giving the optionee the right to purchase the property bought in by the judgment creditors at an execution sale.<sup>3</sup>

**SEC. 714. BREACH BY OPTIONEE PRIOR TO ELECTION.**—In addition to election and notice, and tender when necessary, it frequently happens that the option contract contains provisions requiring the optionee to do some other act during the time limit of the option contract. If the option makes the performance of the act a condition precedent to the right of the optionee to elect, his failure to perform, is a discharge of the option contract and a bar to the enforcement by him of the option right. It is otherwise when the act is not made a condition precedent or the breach is waived by the optionor.

These rules are illustrated and supported by the cases cited in the next following sections of this chapter.

**SEC. 715. SAME. FAILURE TO PAY RENT AS DISCHARGE OF OPTION IN LEASE.**—A lease for 5 years granted the tenant the privilege of purchasing the leased property at any time during the lease, provided he paid the annual rent at

<sup>3</sup> *Peterson v. Rankin*, 161 Iowa 431, 143 N. W. 418.

maturity and further provided that if he failed to do so, in any year, he would forfeit his option right. The tenant failed to pay the annual rent at maturity, and it was held the contract of renting with the option, because of such failure, was forfeited.<sup>1</sup>

Under a clause in a lease with option to renew and to purchase, giving the lessor, at her election, the right to distrain for non-payment of rent, or to declare the lease at an end and recover possession, the lessee waiving notice of such election and demand for possession, it was held that the lease and option were not *ipso facto* forfeited by failure to pay the final installment of the rent at the expiration of the time when it was due, and that a tender and notice before any forfeiture had been declared by any overt act of the lessor, was sufficient to entitle the lessee to specific performance, on the theory that since the right to forfeit was optional with the lessor, the lease and option rights continued until the lessor manifested her intention to forfeit by some clear and unequivocal act, and this, notwithstanding the lessee's express waiver of notice in the lease.<sup>2</sup>

<sup>1</sup> Brown v. Larry, 153 Ala. 452, 44 So. 841; see Clifford v. Gressinger, 96 Ga. 789, 22 S. E. 399; Carpenter v. Thornburn, 76 Ark. 578, 89 S. W. 1047; Chadbourne v. Stockton Sav. Bk., 88 Cal. 636, 26 P. 529; Ober v. Brooks, 162 Mass. 102, 38 N. E. 429.

<sup>2</sup> Keene v. Zindorf, 81 Wash. 152, 142 P. 484; also Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118; Ackerman v. Maddux, 26 N. D. 50, 143 N. W. 147; Bell v. Wright, 31 Kan. 236, 1 P. 595.

Rent tendered and refused need not be again tendered, Paddell v. Janes, 145 N. Y. S. 868.

SEC. 716. SAME. MISCELLANEOUS COVENANTS AND AGREEMENTS.—The rule with reference to the non-payment of rent under a lease containing an option to purchase, would seem to be applicable to any other covenant the performance of which is made a condition precedent to the exercise of the option privilege. Thus, it is held, the failure of the lessee-optionee to keep and perform the following covenants works a discharge of his option rights: to paint and repair;<sup>1</sup> to pay the purchase money;<sup>2</sup> to furnish security;<sup>3</sup> to pay taxes;<sup>4</sup> not to cut timber;<sup>5</sup> to sink a shaft;<sup>6</sup> to pay a certain percentage of "clean-up";<sup>7</sup> to build a dam;<sup>8</sup> to insure the property for the benefit of the

<sup>1</sup> *Bastin v. Bidwell*, L. R. 18 Ch. Div. 238, renewal; *Finch v. Underwood*, L. R. 2 Ch. Div. 310, 16 Eng. Rul. Cas. 15.

<sup>2</sup> *Weston v. Collins*, 11 Jur. (N. S.) 190, 34 L. J. Ch. 353, 13 Wkly. R. 510; *Barnes v. Hustead*, 219 Pa. 287, 68 Atl. 839; *Jennings-Heywood Oil Synd. v. Oil Co.*, 119 La. 793, 44 So. 481.

<sup>3</sup> *McFadden v. McCann*, 25 Iowa 252.

<sup>4</sup> *Forbes v. Connolly*, 5 Grant Ch. (U. C.) 657; *Ball v. Canada Co.*, 24 Grant Ch. (U. C.) 281, holding offer to make good does not cure default; *Bell v. Wright*, 31 Kan. 236, 1 P. 595.

Default by mistake in paying taxes and assessments for a particular year does not prevent the exercise of the option to purchase by the optionee, no demand having been made and the same having been paid by him as soon as discovered, *Ankeny v. Richardson*, 187 Fed. 550, 109 C. C. A. 316, the lessor had refused tender for renewal; *id.*

Payment of taxes is not a condition precedent to election under an option for a year, where the option is exercised during the year, it being sufficient to pay the taxes before the expiration of the option period, *Brink v. Mitchell*, 135 Wis. 416, 116 N. W. 16.

<sup>5</sup> *Ball v. Canada Co.*, 24 Grant Ch. (U. C.) 281.

<sup>6</sup> *Davis v. Eames*, (Cal.) 35 P. 566.

<sup>7</sup> *Champion G. M. C. v. Champion Mines*, 164 Cal. 205, 128 P. 315.

<sup>8</sup> *Briles v. Paulson*, (Cal.) 149 P. 169; *Briles v. Paulson*, (Cal.) 149 P. 804.

optionor;<sup>9</sup> to make a deposit for the faithful performance of the covenants of the lease.<sup>10</sup>

The failure of plaintiff, an attorney at law, to render services stipulated to be rendered by him in locating certain land warrants, was a condition precedent to his right to demand a return of the warrants from defendant under an agreement by which the land warrants were delivered to defendant at a certain price and on condition that plaintiff, if he should so elect, should be entitled to receive them back, at the same price, in the event the applications should be refused by the proper authorities.<sup>11</sup>

Under an option to return goods remaining unused at the end of the year, it was held the optionee did not forfeit his right to return the goods because of his failure to pay the full price for them.<sup>12</sup>

**SEC. 717. SAME. WAIVER OF OPTIONEE'S BREACH.**—The time for payment of rent under a lease containing an option to purchase the premises, is for the benefit of the lessor and may be waived by him.<sup>1</sup> The receipt by the lessor of rent after it is due is a waiver by the lessor of the

<sup>9</sup> Chadbourne v. Stockton etc. Soc., 88 Cal. 636, 26 P. 529.

<sup>10</sup> Frank v. Stratford-Handcock, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571, the deposit fell with the lease, as it was a condition to its taking effect.

There is no breach where performance is prevented by the optionor, Jones v. Brown, 171 Mass. 318, 50 N. E. 648.

<sup>11</sup> Hill v. Mathews, 78 Mich. 377, 44 N. W. 286.

<sup>12</sup> Ramsey v. West, 31 Mo. App. 676.

<sup>1</sup> See Sec. 715.

strict performance of the terms of the option privilege.<sup>2</sup> The failure of the lessor to object to the erection of the building strictly in accordance with the provisions of the lease, or to make any inquiry as to the intention of the lessee during its construction, constitutes a waiver of the right to declare a forfeiture for violation of the covenant requiring the construction of the building.<sup>3</sup> And so, where the lessor permits large expenditures of money in developing oil property;<sup>4</sup> or prevents performance by the optionee;<sup>5</sup> and where he refuses a tender for renewal, he thereby waives default of the lessee in the payment of taxes and assessments for a particular year.<sup>6</sup> Failure of the lessor to tender a deed is no excuse for the lessee's failure to pay the last rental note.<sup>7</sup>

SEC. 718. CONDITIONAL ELECTION.—As we have seen, if the offeree, before the expiration

<sup>2</sup> Mack v. Dailey, 67 Vt. 90, 30 Atl. 686; also Crystal Lake Cemetery Ass'n v. Farnham, 129 Minn. 1, 151 N. W. 418; also Raddatz v. Florence Inv. Co., 147 Wis. 636, 133 N. W. 1100; also Green v. Low, 22 Beav. 625, 2 Jur. (N. S.) 848, 4 Wkly. Rep. 669, 52 Eng. Reprint 1249, insurance; Raffety v. Schofield, L. R. 1 Ch. 937, 66 L. J. Ch. 448, 76 L. T. Rep. (N. S.) 648, 45 Wkly. Rep. 640.

Brown v. Larry, 153 Ala. 452, 44 So. 841, holds to the contrary on the theory that the lease and option are separate agreements, and receipt of rent was under the lease and not under the option, and stating also the rule for application of payments. On the other hand, Mathews Slate Co. v. New Empire Slate Co., 122 Fed. 972, holds that default in payment of rent does not affect option in the lease *because they are separate agreements*.

<sup>3</sup> Hawes v. Favor, 161 Ill. 440, 43 N. E. 1076.

<sup>4</sup> Owens v. Petroleum Co., (Tex. Civ. App.) 169 S. W. 192.

<sup>5</sup> Jones v. Brown, 171 Mass. 318, 50 N. E. 648.

<sup>6</sup> Ankeny v. Richardson, 187 Fed. 550, 109 C. C. A. 316.

<sup>7</sup> Carpenter v. Thornburn, 76 Ark. 578, 89 S. W. 1047.

of the time limit, rejects the offer, or otherwise communicates to the offerer that he will not accept, the offer is at an end,<sup>1</sup> and the same consequences follow an acceptance, which is not in accordance with the terms of the offer.<sup>2</sup> This is the rule governing mere offers but it is believed that where the offer is supported by a consideration, that is, is a real option, a mere conditional election, for instance, prior to the expiration of the time limit, does not *ipso facto* terminate the option, and if, thereafter and within the time limit, the optionee elects unconditionally and in accordance with its terms, he does not lose his right thereunder, to make a new and proper election within the time limit, where, for instance, an unauthorized condition is inadvertently annexed, or by mistake, the tender is made at the wrong place.<sup>3</sup>

SEC. 719. ELECTION.—An election is the act which converts the option into a bilateral contract. By election the option contract is discharged in the sense that thereafter the rights and liabilities of the parties are measured by rules applicable to bilateral contracts and not by the rules peculiar to options or offers. The judicial development of the subject is of unusual interest. It is one of the most important in the law of options. It will be found presented in the next chapter.

<sup>1</sup> Sec. 710.

<sup>2</sup> Sec. 838.

<sup>3</sup> See Sec. 838.



## CHAPTER VIII.

### ELECTION AND NOTICE.

- Sec. 801. Generally.
- Sec. 802. By whom election must be made.
- Sec. 803. Same. Agent.
- Sec. 804. Same. Assignee.
- Sec. 805. Joint or several optionees.
- Sec. 806. Same, continued. Decisions.
- Sec. 806a. Same. Partners.
- Sec. 807. Same. Partners.
- Sec. 808. Same. Representative of deceased optionee.
- Sec. 809. To whom notice must be given. Optionor. Agent.
- Sec. 810. Same. Grantee of optionor.
- Sec. 811. Same. Joint or several optionors.
- Sec. 812. Same. Representative of deceased optionor. Minors.
- Sec. 813. Elements of election.
- Sec. 814. The election must be communicated.
- Sec. 815. Terms of option control mode of election.
- Sec. 816. Written or oral election or acceptance.
- Sec. 817. Communication of election by act.
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- Sec. 819. Same. Continued.
- Sec. 820. Place of election or acceptance.
- Sec. 821. Election must be definite.
- Sec. 822. Election as to part of property.
- Sec. 823. Particular act as election or acceptance. Generally.
- Sec. 824. Particular act as election or acceptance. Statements and conversations.
- Sec. 825. Particular act as election or acceptance. Letters and other writings.
- Sec. 826. Particular act as election or acceptance. Ordinances by municipalities, etc.
- Sec. 827. Particular act as election or acceptance. Possession and improvements.

- Sec. 828. Particular act as election or acceptance. Sale and return. Sale on trial or approval. Bailment. Generally.
- Sec. 829. Particular act as election or acceptance. Agreements to repurchase. Agreements and options involving shares of stock and bonds.
- Sec. 830. Particular act as election or acceptance. Sale on trial or approval. Bailment.
- Sec. 831. Particular act as election or acceptance. Renewal or extension of lease.
- Sec. 832. Particular act as election or acceptance. Rule where lessee holds over and pays higher or different rental.
- Sec. 833. Particular act as election or acceptance. Rule where same rental is paid. Renewals.
- Sec. 834. Particular act as election or acceptance. Rule where same rental is paid. Extensions.
- Sec. 835. Particular act as election or acceptance. Rule where written or formal notice is provided for or implied or the mode of communication is prescribed.
- Sec. 836. Particular act as election or acceptance. Failure of lessee to give notice to terminate the lease. Also lessor's option.
- Sec. 837. Election varying terms of offer or option. Generally.
- Sec. 838. Effect of conditional acceptance or election. Distinction between acceptance of offer and election under option.
- Sec. 839. Election and performance distinguished.
- Sec. 840. Election varying terms of option. Cases.
- Sec. 841. Conditional elections. Cases.
- Sec. 842. Same. Continued.
- Sec. 843. Unconditional election. *Turner v. McCormick*.
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- Sec. 848. Time of election. Generally.
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- Sec. 863. Election. Equitable relief to optionee. Generally.
- Sec. 864. Election. Equitable relief. Accident and act of God.
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- Sec. 866. Election. Equitable relief. Miscellaneous cases granting relief.
- Sec. 867. Election. Equitable relief. Miscellaneous cases denying relief.
- Sec. 868. Election. Waiver and estoppel.
- Sec. 869. Waiver and estoppel. Cases holding acts constitute waiver.
- Sec. 870. Waiver and estoppel. Cases holding acts not waiver.
- Sec. 871. Effect of sufficient or insufficient election.
- Sec. 872. Same. Miscellaneous cases.

SECTION 801. GENERALLY.—Election is the act of the optionee which converts the option contract into a binding promise on the part of the optionor to sell.<sup>1</sup> If an election be likened to a condition precedent<sup>2</sup> then it may be said that election is the performance of the condition by the optionee.

The particular act or acts which constitute an election may be fixed by the terms of the option, as also the time when, the place where,<sup>3</sup> and the person to whom it shall be made.<sup>4</sup> As we shall see, an election, other than by performance of an act,<sup>5</sup>

<sup>1</sup> *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

If no condition precedent is imposed, such as payment of the price, the exercise of the option consists merely of notice of election by the optionee to purchase, *Winders v. Kenan*, 151 N. C. 628, 77 S. E. 687.

<sup>2</sup> *Bluthenthal v. Atkinson*, 93 Ark. 252, 124 S. W. 510; *Rogers v. Burr*, 105 Ga. 432, 31 S. E. 438, 70 A. S. R. 50.

Election is not the making of the bilateral contract in the sense that the minds of the parties must then meet in common or mutual agreement. If it were so, then the refusal of the optionor to concur in or accept the election would end the rights of the optionee. An election is the exercise of a right growing out of a previously existing contract, a right which permits the optionee to raise a bilateral contract without the assent of the optionor. It is a condition precedent, but when the option right is exercised, the option is turned into a bilateral contract by virtue of the condition and not by virtue of any mutual assent or agreement of the parties at that time. See *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485. This explains why it is *not* a "legal paradox that a contract for the sale of land, mutual and enforceable, can be made when at the time it is claimed to have been made, one party to it is openly protesting that he will make no such contract," quoting Justice Ostrander, concurring in *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586, 12 Ann. Cas. 88.

<sup>3</sup> *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997.

<sup>4</sup> *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441.

<sup>5</sup> See Sec. 817; *Goldberg v. Drake*, 145 Mich. 50, 108 N. W. 367; *McCarty v. Helbing*, (Ore.) 144 P. 499.

involves the notion of notice and this implies a communication to the optionor.<sup>6</sup> These also are matters clearly within the contract powers of the parties and consequently the kind of notice and the mode of communicating it, may also be fixed by the terms of the option contract. In the absence of express provisions in the option, the election must be made in accordance with the terms implied by law.<sup>7</sup>

An offer is turned into a real contract by “acceptance” of the offer. The word “acceptance” is frequently applied to option contracts but when so applied it must be understood as meaning “election.” An offer is not “elected,” nor strictly speaking, is an option “accepted”. An option contract is *performed*, the performance consisting of election. An offer is not performed as there is nothing to perform until after acceptance. An option is a contract from its inception, that is to say, it is a conditional contract which is turned into a binding promise by performance of the condition.<sup>8</sup> An offer is not a contract until accepted.

The effect of a timely and proper election under an option contract, and of a timely and proper acceptance of an offer, is the same, in that the option contract, on the one hand, and the offer on the other, are turned into bilateral contracts.<sup>9</sup> The process, however, is one of transformation, for the

<sup>6</sup> Breen v. Mayne, 141 Iowa 399, 118 N. W. 441.

<sup>7</sup> See Secs. 815, 856.

<sup>8</sup> Corson v. Mulvany, 49 Pa. 88, 88 Am. Dec. 485.

<sup>9</sup> Watson v. Coast, 35 W. Va. 463, 14 S. E. 249; Johnston v. Trippe, 33 Fed. 530.

terms of the option, or of the offer, remain as the terms of the contract thus raised.<sup>10</sup>

Failure timely and unconditionally to elect discharges the option contract and releases the optionor from all liability thereunder.<sup>11</sup> An offer may be withdrawn by the proposer at any time before its acceptance, and it lapses if not timely accepted.<sup>12</sup> An option may not be withdrawn by the optionor during its time limit.<sup>13</sup>

**SEC. 802. BY WHOM ELECTION MUST BE MADE.**—An option privilege must necessarily be exercised by the owner of the privilege. It may not be exercised by a stranger to the contract.<sup>1</sup> The

<sup>10</sup> *Copp v. Longstreet*, 5 Colo. App. 282, 38 P. 601.

<sup>11</sup> See Sec. 707.

<sup>12</sup> See Sec. 703.

<sup>13</sup> See Sec. 703.

<sup>1</sup> *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; *Emery v. Hill*, 67 N. H. 330, 39 Atl. 266, notice to renew lease signed by third person is not notice by lessees.

Optionee may not substitute a third person, *Vanderlip v. Peterson*, 16 Manitoba 341.

Not by owner of equitable interest (mortgagee) under English rule as to mortgage of personal property, *Friary H. & H. Breweries v. Singleton*, 28 L. J. Ch. 622, 2 Ch. 261, 81 L. T. (N. S.) 101, 47 Wkly. Rep. 662.

*Lewis v. Agoure*, 8 Cal. App. 146, 96 P. 327, case where lessee under option to cancel lease, in event of sale of premises, held to have authority to exercise option though he had conveyed title. Another case holds that it is otherwise under a mere stipulation to terminate the tenancy, *Griffin v. Barton*, 22 Misc. R. 228, 49 N. Y. S. 1021.

Sub-lessee is not entitled as such to renewal of lease, *Cifelli v. Santamaria*, 79 N. J. L. 354, 75 Atl. 434; *Audubon Hotel Co. v. Braunnig*, 120 La. 1089, 46 So. 33; *Marino v. Williams*, 30 Nev. 360, 96 P. 1073.

Case where optionee was alien and prohibited by constitution of state from owning land, *Keene v. Zindorf*, 81 Wash. 152, 142 P. 484.

optionee may, of course, delegate authority to exercise the option to his agent, in which case the act of the agent is, in law, his act.<sup>2</sup>

In those jurisdictions where the option is assignable, the assignee of the option privilege is authorized to exercise it.<sup>3</sup> Again, upon his death, or in case of his incompetency subsequently arising, the representative of the optionee appointed by law, is authorized to exercise the option privilege.<sup>4</sup>

Where the option is taken in the name of the agent either in fraud of the rights of the principal or by his direction, the principal undoubtedly has the right to exercise the option privilege where the fact is known to the optionor at the time, and perhaps also where the fact of the agency was unknown to him at the time, unless the optionor was induced to give the option to the agent by reason of some fact which would make the option right strictly personal to the optionee.<sup>5</sup>

<sup>2</sup> *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441.

<sup>3</sup> *Tyler v. Barrows*, 29 N. Y. Sup. Ct. 104; *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703; *Gustin v. Union School Dist.*, 94 Mich. 502, 54 N. W. 156, 34 A. S. R. 361, lease; but not where option privilege is restricted to optionee, *Myers v. J. J. Stone & Son*, 128 Iowa 10, 102 N. W. 507, 111 A. S. R. 180, 5 Ann. Cas. 912.

The assignee must, of course, have succeeded to the entire option interest of the original optionee, see *Wheeling Creek etc. Co. v. Elder*, 170 Fed. 215.

<sup>4</sup> See Sec. 808.

<sup>5</sup> See *Daniels v. Straw*, 53 Fed. 327; *Shields v. Coyne*, 148 Iowa 313, 127 N. W. 63; *Lenman v. Jones*, 33 App. D. C. 7; *Henry v. Black*, 213 Pa. 620, 63 Atl. 250.

Where option is under seal the party named and not the principal is entitled to maintain suit for damages, *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413; and so in any case where the principal is not objecting, *Pearson v. Horne*, 139 Ga. 453, 77 S. E. 387.

The assignee of an option privilege gave notice of election reciting acceptance of the offer, made a small payment, and took a receipt running to him as treasurer of a certain coal company, not then incorporated. The company was subsequently organized, but after the expiration of the option time, when the option was assigned to it. It was held there was no election by the assignee nor by any party bound to perform.<sup>6</sup>

SEC. 803. SAME. AGENT.—A lease gave the tenant, a married woman, an option to renew. Notice of her election to renew was signed by her husband alone, but the notice showed that she was the lessee. The husband was her general manager. The notice was held sufficient.<sup>1</sup>

Where an attorney employed by a vendor was authorized by him to do whatever was necessary to procure a reconveyance of the land under an

<sup>5</sup> Under an election to renew lease by one standing in fiduciary relation to lessee, the latter holds in trust for lessee, *McCourt v. Singers-Bigger*, 145 Fed. 103, 76 C. C. A. 73, 7 Ann. Cas. 287.

Generally, see *Lawyer v. Post*, 109 Fed. 512, 47 C. C. A. 491; *Kelley v. Thuey*, 143 Mo. 422, 45 S. W. 300, undisclosed principal.

<sup>6</sup> *Wheeling Creek etc. Co. v. Elder*, 170 Fed. 215, in this case the original option ran to the optionee, his heirs, etc. The optionee assigned but without express words of further assignment and the decision seems to be influenced by this fact. The effect of the decision is that the election must be made by such person that thereby an obligation will be raised which will be enforceable by the optionor. This statement, however, must be considered in connection with the rule under the Statute of Frauds, touching written and oral election. See Secs. 416, 417.

<sup>1</sup> *Coy v. Title G. & T. Co.*, 198 Fed. 275.



option to the vendor to repurchase, he is authorized to give notice of election to repurchase.<sup>2</sup>

SEC. 804. SAME. ASSIGNEE.—The assignability of an option privilege is presented in a preceding chapter,<sup>1</sup> and while, as there shown, there are a few well established exceptions, the general rule is that an option privilege is assignable. Assuming the option privilege is assignable, the assignee becomes its owner, and is clothed with the authority of the original optionee, at least so far as the right to exercise the option privilege and communication of that fact are concerned. Accordingly it is held an assignee is the proper party to exercise the option privilege and give notice.<sup>2</sup>

<sup>2</sup> Rohling v. Thole, 256 Ill. 425, 100 N. E. 138.

As to right of undisclosed principal, see Shields v. Coyne, 148 Iowa 313, 127 N. W. 63; Lenman v. Jones, 33 App. D. C. 7; Sec. 802.

Election by an unauthorized agent does not bind the principal and the principal cannot, when he finds the contract advantageous to him, affirm it and recover damages from the vendor for his failure to make title, Athe v. Bartholemew, 69 Wis. 43, 33 N. W. 110, 5 A. S. R. 103.

<sup>1</sup> See Chapter VI.

Of course if the option is not assignable, an election by an assignee does not convert the option into a promise to sell, Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150; see Sec. 604.

<sup>2</sup> Napier v. Darlington, 70 Pa. 64; Blair v. Hamilton, 48 Ind. 32; Adams v. Peabody Coal Co., 230 Ill. 469, 82 N. E. 645; Perkins v. Hadsell, 50 Ill. 216.

Warner v. Cochrane, 128 Fed. 553, 63 C. C. A. 207, case where lessee was held estopped to challenge election by assignee where assignment was made without her written consent as required by lease. But it would be otherwise where there was no estoppel and no consent, Upton v. Hosmer, 70 N. H. 493, 49 Atl. 96; Connor v. Withers, 20 Ky. Law Rep. 1326, 49 S. W. 309, renewal of lease; Cook v. Jones, 96 Ky. 283, 28 S. W. 960, 16 Ky. L. Rep. 469, renewal of lease; McClintock v. Joyner, 77 Miss. 678, 27 So. 837, 78 A. S. R. 541.

An option privilege contained in a lease, either to purchase, to renew, or extend the term, is, as a rule, construed to be assignable, or as passing with the lease, and to vest in the assignee the power to exercise the option privilege,<sup>3</sup> and, since the consideration for the option is furnished by the lease itself, it seems to be immaterial whether the assignment is made before or after the exercise of the option by the original lessee.<sup>4</sup>

### SEC. 805. JOINT OR SEVERAL OPTIONEES.

—The law seems to be well settled that neither a tenant in common nor a joint tenant can grant an option privilege that will be binding upon his co-tenant, without previous authority, express or implied, or subsequent ratification by the latter.<sup>1</sup>

<sup>2</sup> Case where optionee elected and assignee intervened and specific performance was denied to assignee, *Schæffer v. Herman*, 237 Pa. 86, 85 Atl. 94.

Right of mortgagee of leasehold to exercise option, see *Conn v. Tonner*, 86 Iowa 577, 53 N. W. 320; *Halsted v. Colvin*, 51 N. J. Eq. 387, 26 Atl. 928.

Right of equitable assignee to exercise option, see *Holroyd etc. Breweries v. Singleton*, 2 Ch. 261, 60 L. J. Ch. 622, 81 L. T. Rep. (N. S.) 101, 47 Wkly. Rep. 662.

It is said a court of equity will not specifically enforce contract at suit of assignee of vendee, if the assignee has not assumed any personal liability for the performance of the contract, since there would be no mutuality between the vendor and the assignee; see *Genevetz v. Feiring*, 121 N. Y. S. 392, 136 App. Div. 736; *Wheeling Creek G. C. & C. Co. v. Elder*, 170 Fed. 215.

<sup>3</sup> *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560; *Guffey v. Clever*, 146 Pa. 548, 23 Atl. 161; *Blackmore v. Boardman*, 28 Mo. 420, execution sale of lessee's interest; *Probst v. Rochester S. L. Co.*, 171 N. Y. 584, 64 N. E. 504, making assignee liable for unexpired portion of time; *Spangler v. Spangler*, 11 Cal. App. 321, 104 P. 995.

<sup>4</sup> *House v. Jackson*, 24 Ore. 89, 32 P. 1027.

<sup>1</sup> Sec. 206.

This lack of authority necessarily arises from the nature of the respective estates of the tenants.<sup>2</sup>

Where several persons join in purchasing an option privilege by one and the same instrument, the right of one or of less than all of the optionees to exercise the option right and give notice, must be ascertained from the instrument itself as clothing them with several or with joint rights and interests.<sup>3</sup>

If, for instance, the instrument is so drawn as to grant to each person a several estate, then there are as many separate contracts as there are optionees, notwithstanding they are all embraced in one writing, and the right of each optionee is the same as if he was the sole optionee, and hence he alone is the person to exercise the option privilege for himself but not for the other optionees.<sup>4</sup>

On the other hand, if the option runs to several optionees jointly, then, as a general rule, all of the optionees must join in the exercise of the option

<sup>2</sup> Tenants in common of land are not bound by the acts of a co-tenant in accepting a balance of the purchase money and promising a deed after the right thereto had been forfeited, *Pearis v. Covilland*, 6 Cal. 617, 65 Am. Dec. 543.

<sup>3</sup> *Hooks v. Forst*, 165 Pa. 238, 30 Atl. 846, 847.

The contract can not be treated as joint or several at the option of the optionees, *Eveleth v. Sawyer*, 96 Me. 227, 52 Atl. 639.

<sup>4</sup> See *Nott v. Owen*, 86 Me. 98, 29 Atl. 943, 41 A. S. R. 525; also *In re Walbridge*, 198 N. Y. 234, 91 N. E. 590, involving an option in a will to several legatees to purchase property of the estate where it was held the rights of the legatees were equal until one of them first elected; but a tender by one tenant in common on behalf of all is good, *Gentry v. Gentry*, 33 Tenn. 87, 60 Am. Dec. 137.

and in giving notice.<sup>5</sup> The theory is that one joint optionee may not exercise the option privilege and thus fasten a liability upon the other joint optionees, without their authority, but particular cases show that a like authority is sometimes implied,<sup>6</sup> and in others, where equity requires it, the courts have not always observed the strict letter of the rule.<sup>7</sup>

<sup>5</sup> As said in *Rogers v. Burr*, 105 Ga. 432, 31 S. E. 438, 70 A. S. R. 50, a joint contract between persons not partners can have no inception and can not be changed in time, amount, subject, form, or substance, without the several act of each of the joint contractors. See *Clark v. Harmer*, 5 App. D. C. 114; *Davis v. Pfeiffer*, 213 Ill. 249, 72 N. E. 718, suit by one joint vendee.

The optionor is not obliged to accept the note of one joint optionee alone, even when the other has assigned to the one electing, *Hambleton v. Jameson*, (Iowa) 143 N. W. 1010.

The erasure by one of six optionees of his name from the written notice of election signed by all, without the consent of the others, does not affect the validity of the election, *Burton v. Shotwell*, 76 Ky. (13 Bush.) 271.

<sup>6</sup> As where the relation of principal and agent arises by virtue of some transactions of the tenants, see *Neff v. Elder*, 84 Ark. 277, 105 S. W. 260, or where the tenants jointly pursue the common purpose of acquiring title to land (notice concerning condition of title to one being notice to all), *Steele v. Robertson*, 75 Ark. 228, 87 S. W. 117; see, also, *Clifford v. Meyer*, 6 Ind. App. 633, 34 N. E. 23, employment of broker to sell; *Barton v. Gray*, 48 Mich. 164, 12 N. W. 30, agreement to cut timber.

<sup>7</sup> *Schaeffer v. Herman*, 237 Pa. 86, 85 Atl. 94, where one optionee repudiated the option and the other tendered the entire purchase price and his election alone was held good.

*Holt v. Silver*, 169 Mass. 435, 48 N. E. 837, holding that where one who, after making a contract with two persons providing for written notice to terminate it, procures the interest of one of such persons by assignment, can not complain that the other alone gave notice of termination; *Pearson v. Millard*, 150 N. C. 303, 63 S. E. 1053, holding optionor estopped on facts; *Poehler v. Reese*, 78 Minn. 71, 80 N. W. 847, case where tender by one tenant in common was held sufficient, on facts, for all.

## SEC. 806. SAME CONTINUED. DECISIONS.

—Howell leased jointly to Behler and five others, certain premises for the term of five years with the privilege of continuing the lease five years more upon giving 60 days' notice prior to the end of the term. Behler died and at an administrator's sale, the lease, with the option to continue, was sold to Julia Behler and she gave the required notice to Howell to continue the lease for the further term of five years, the other lessees not joining or concurring. It was held the lease was executed jointly to the six lessees; that they were all jointly bound by the covenants therein and that no one of the lessees was authorized to extend the term or to make the extension binding upon the others without their concurrence.<sup>1</sup>

In a Minnesota case,<sup>2</sup> certain premises were leased to two tenants as joint lessees, with the privilege of an additional term. The rule was laid down that in order to continue the lease it was necessary for both tenants to exercise the option; that such intention may be expressed jointly or independently, or by remaining in possession, but that when one of the tenants expressly informed the owner that he refused to extend the lease jointly

<sup>1</sup> Howell v. Behler, 41 W. Va. 610, 24 S. E. 646, also holding that upon entry by one of the lessees, his occupancy is the occupancy of all, whatever might be the relation between themselves, and, further, that parol evidence was not admissible to prove that the other five lessees were merely sureties for Behler.

Clark v. Harmer, 5 App. D. C. 114, also holds that possession taken by one joint optionee is presumably on joint act and for joint benefit.

<sup>2</sup> Tweedie v. P. E. Olson H. & F. Co., 96 Minn. 238, 104 N. W. 895, 1089, s. c. 98 Minn. 11, 107 N. W. 557; also Finch v. Underwood, L. R. 2 Ch. Div. 310, 16 Eng. Rul. Cas. 15; Bastin v. Bidwell, L. R. 18 Ch. Div. 238.

with a co-tenant notice by the latter that he would remain under the terms of the lease did not have the effect to continue the term.

In an Iowa case,<sup>3</sup> a stockholder agreed to sell, to two other stockholders, a certain amount of stock, delivering the number of shares to each that they might agree upon. It was held an election by one of the optionees, without the consent of the other, did not bind the optionor.

SEC. 806a. SAME. PARTNERS.—In an ordinary partnership, each partner is the agent of the firm and of the other partners, for the transaction of the business of the partnership.<sup>1</sup> If the business of the partnership is the buying and selling of property as a method of carrying on its business, it would seem that each partner, acting for himself as principal, and as agent for the other partners, has authority to take an option in the name of the partners, and consequently has the right to exercise the option privilege and give notice for himself and also as agent for the other partners.<sup>2</sup> The

<sup>3</sup> Pratt v. Prouty, 104 Iowa 419, 73 N. W. 1035, 65 A. S. R. 472.

<sup>1</sup> See Deakin v. Underwood, 37 Minn. 98, 33 N. W. 318, 5 A. S. R. 827; Midland Nat'l Bank v. Schoen, 123 Mo. 650, 27 S. W. 547; George on Partnership, p. 212.

<sup>2</sup> Draper v. Moore, 2 Cin. R. (Ohio) 167; Copp v. Longstreet, 5 Colo. App. 282, 38 P. 601.

Where the firm is engaged in the real estate business its lands will be considered as personalty and a bond for title executed in the firm name by one partner, without the others' consent, binds the firm, and will be enforced against both, *Rovelsky v. Brown*, 92 Ala. 522, 9 So. 182, 25 A. S. R. 83; *Paton v. Baker*, 62 Iowa 704, 15 N. W. 586; *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887, Statute of Frauds.

option, however, must be exercised and notice given on behalf of all the partners, since the option right runs to them and not to any individual partner.<sup>3</sup> If an option is taken by the members of a partnership on property outside of its partnership business, then, as to that particular transaction, the partnership relation of principal and agent above noted, does not exist, and the right of the individual members to elect and give notice must be determined in accordance with the rule relating to joint or co-contractors.<sup>4</sup>

SEC. 807. SAME. PARTNERS. CHANGE IN MEMBERSHIP.—In a suit for specific performance of a covenant to renew a five year lease, it is immaterial that at a certain time during the first term of the lease, another person held an interest by assignment of one of the partners in the partnership, where the persons who constituted the partnership at the time of the election to renew, were the same persons who were members of the firm at the time of the execution of the lease to them.<sup>1</sup>

Defendant leased to plaintiffs, co-partners, a newspaper, the agreement providing for a renewal

<sup>2</sup> The general rule, however, is that a partner, by his deed alone, can not, without proper written authority from the other partners, convey the joint interest of the firm in the land. *Rovelsky v. Brown*, *supra*.

<sup>3</sup> See *Pearson v. Millard*, 150 N. C. 303, 63 S. E. 1035, where one partner for himself elected and this was held good, the optionor not objecting to the election and the other partner having assigned to the one electing.

<sup>4</sup> See Secs. 805, 811; also *Wiswall v. McGowan*, 2 Barb. (N. Y.) 270.

<sup>1</sup> *Fred Gorder & Son v. Pankonin*, 83 Neb. 204, 119 N. W. 449.

for a further term and containing a provision that, in case of the termination of the partnership, the partner succeeding to the business might continue by himself alone or by a new partnership satisfactory to defendant. The old partnership was dissolved and a new one was formed in which one of the partners held only a nominal interest. The other partner was held to be entitled to specific enforcement of the covenant for renewal.<sup>2</sup>

Where a lease to a partnership for three years gave an unrestricted privilege of renewal for three years more, at the option of the partners, the assignment by one member of all his interest therein to the other, transferred to the remaining member the right to a renewal of the lease.<sup>3</sup> In another case, it was held that a lease to a partnership firm with option to renew, was not a mere joint option to the four partners which would be revoked by the death of one of them before the option was exercised, but was an absolute right of the firm which could be exercised by a new firm, composed of the surviving partners which succeeded the original lessee and which had an assignment of the interest of the deceased partner, as provided by the partnership agreement.<sup>4</sup>

<sup>2</sup> *Floyd v. Storrs*, 144 Mass. 56, 10 N. E. 743.

Power of partner to surrender lease, see *Bergland v. Frawley*, 72 Wis. 559, 40 N. W. 372; *James v. Pope*, 19 N. Y. 324.

Rights as between partners on renewal of lease made by one, *Knapp v. Reed*, 88 Neb. 754, 130 N. W. 430, Ann. Cas. 1912B, 1095.

<sup>3</sup> *Barbee v. Greenberg*, 144 N. C. 430, 57 S. E. 125, 12 Ann. Cas. 967.

<sup>4</sup> *Liggett v. Kaufman*, 231 Pa. 398, 80 Atl. 871.



SEC. 808. SAME. REPRESENTATIVE OF DECEASED OPTIONEE.—The purchaser of shares of stock at a pledge sale agreed with the pledgor to return the shares upon payment of a certain sum. The pledgor died and his administrator made timely tender of payment, and the purchaser refused to return the shares, and it was held the administrator had cause of action to compel the transfer of the shares.<sup>1</sup>

A lease with option to purchase running to the lessee, his heirs, etc., inures to the benefit of the heirs of the lessee and they can exercise the option.<sup>2</sup> It is otherwise where, as construed by the court, the option privilege is personal to the optionee. In such case, according to the Illinois rule, where the optionee dies during the time limit without electing, he has no estate in the property which descends to the heirs.<sup>3</sup> There does not seem to be uniformity of decision on this point. In New York it is held that under a covenant in a lease for renewal which does not run to the heirs, etc., of the lessee, upon the death of the lessee, those who succeed to his rights may compel a renewal.<sup>4</sup>

<sup>1</sup> Sayward v. Houghton, 119 Cal. 545, 51 P. 853, 52 P. 44.

<sup>2</sup> Ankeny v. Richardson, 187 Fed. 550, 109 C. C. A. 316.

By administrator for benefit of next of kin, *Adams v. Kensington Vestry*, In re, 54 L. J. Ch. 87, 27 Ch. Div. 394, 51 L. T. Rep. 382, 32 Wkly. R. 883.

<sup>3</sup> Sutherland v. Goodnow, 108 Ill. 528, 48 Am. Rep. 560.

*Sutherland v. Parkins*, 75 Ill. 338, the theory was that the heir could not take money from the personal estate to purchase for himself property which his ancestor was not bound to purchase and perhaps would not have purchased. The same conclusions seem to have been reached on similar facts in *Newton v. Newton*, 11 B. I. 390, 23 Am. Rep. 476.

<sup>4</sup> Kolasky v. Michels, 120 N. Y. 635, 24 N. E. 278.

SEC. 809. TO WHOM NOTICE MUST BE GIVEN. OPTIONOR. AGENT.—The rules laid down in preceding sections with reference to the person authorized to exercise the option privilege and give notice, apply, in a general way, to the person to whom notice of the exercise of the option must be given. Unless the option otherwise provides, and it may legally provide that notice may be given to a person other than the optionor, notice of the fact that the option is exercised must be given to the optionor.<sup>1</sup> In law, this means notice may be given to the agent of the optionor.<sup>2</sup> Of course, the agent must be one authorized to receive the notice. Leaving the notice with a mere employee of the optionor is not sufficient.<sup>3</sup>

<sup>1</sup> *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

<sup>2</sup> *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360, notice was given to the person who as lessor's agent executed the lease containing the option and this was held good; see *Broadway & S. A. R. Co. v. Metzger*, 15 N. Y. S. 662, 27 Abb. N. C. 160; see *Hayes v. Goldman*, 71 Ark. 251, 72 S. W. 563, notice to clerk not good, but holding over was election to renew.

Notice addressed to the secretary of the optionor—corporation, without adding designation of his office, is good, *Carton v. Wilson*, 13 Ont. L. Rep. 412.

Vote of school board to purchase construed as acceptance of offer theretofore made by a particular person, though not named, *McManus v. City of Boston*, 171 Mass. 152, 50 N. E. 607.

<sup>3</sup> *Gross v. Arnold*, 177 Ill. 575, 52 N. E. 867; see *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539, note tendered at office of attorney for optionor.

Service of notice of election to sell stock back to promoters of corporation under subscription agreement of guarantee, etc., is not good when served upon the person who acted as agent in securing the subscription, *Rogers v. Burr*, 105 Ga. 432, 31 S. E. 438, 70 A. S. R. 50.

As to partners, see Sec. 806a.

## SEC. 810. SAME. GRANTEE OF OPTIONOR.

—Where the optionor conveys the optioned property to a third person who has no notice of a prior option given by the optionor to another person, and who is a *bona fide* purchaser within the rule on that subject, the third person takes the title to the property free from the option privilege.<sup>1</sup> In such case, notice by the optionee of the exercise of the option, given to the *bona fide* purchaser would not be sufficient either to raise a binding contract or to bind the grantee to convey. Where, however, the grantee has notice, it is held in California, that notice of election is properly given to the grantee.<sup>2</sup> And in other jurisdictions it is held that notice is properly given to the original optionor-grantor.<sup>3</sup>

It is believed the equitable rule of notice of outstanding rights in third persons in the property conveyed, does not go so far as to compel the grantee with notice to perform the obligations of the grantor, in the absence of an agreement on his part amounting in effect to a novation, except, perhaps, in those cases where, as in leases containing options to purchase and the like, it is held the

<sup>1</sup> See Sec. 515.

<sup>2</sup> *Walter G. Reese Co. v. House*, 162 Cal. 740, 124 P. 442; see, however, *Parkside Realty Co. v. MacDonald*, 166 Cal. 426, 137 P. 21.

*McLaughlin v. Royce*, 108 Iowa 254, 78 N. W. 1105, holds, on the facts, that election *must* be made to grantee of optionor.

See *Burt v. Henry*, 10 Ala. 874, holding tender by obligee under bond for title on condition that a certain note was paid, should be made to assignee of note.

<sup>3</sup> *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150.

covenant runs with the land,<sup>4</sup> or where, perhaps, the grantee obligates himself to perform the option agreement.<sup>5</sup> The rule, as we understand it, notwithstanding the transfer, permits the optionee to enforce the option contract against the original optionor<sup>6</sup> and, also, against his grantee in the sense only that the rights of the latter are subject to the enforcement of the option contract and whose title as grantee may be divested where he is made a party to the suit.<sup>7</sup>

The difficulty here is that an option contract can be raised to a bilateral contract only by an election and, in the absence of what in effect amounts to a novation, it is not at all clear how an option contract can be turned into a bilateral contract by an election given to a grantee who is not a party to the contract. However, there may be equitable

<sup>4</sup> See *Callan v. McDaniel*, 72 Ala. 96, lease; *Piggot v. Mason*, 1 Paige (N. Y.) 412, lease; *Laffan v. Naglee*, 9 Cal. 663, 70 Am. Dec. 678, renewal of lease; *Blackmore v. Boardman*, 28 Mo. 420, renewal of lease; *Wilkinson v. Pettit*, 47 Barb. (N. Y.) 230, to continue lease; *McClung v. McPherson*, 47 Ore. 73, 81 P. 567, option to lessor to terminate lease; *Blount v. Connolly*, 110 Mo. App. 603, 85 S. W. 605, lease.

<sup>5</sup> See *Springer v. De Wolf*, 194 Ill. 218, 62 N. E. 542, 56 L. R. A. 465, 88 A. S. R. 155, affirming 93 Ill. App. 260.

<sup>6</sup> See *Neal v. Jefferson*, 212 Mass. 517, 99 N. E. 334, Ann. Cas. 1913D 205; *Harrington v. Barnes*, 10 Cush. 106 (Mass.); *Parkside Realty Co. v. MacDonald*, 166 Cal. 426, 137 P. 21.

<sup>7</sup> See *Veith v. McMurtry*, 26 Neb. 341, 42 N. W. 6; *Frank v. Stratford-Hancock*, 13 Wyo. 37, 77 P. 134, 136, 67 L. R. A. 571, 110 A. S. R. 963; *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539; *Harper v. Runner*, 85 Neb. 343, 123 N. W. 313; *Bentley v. Barnes*, 162 Ala. 524, 50 So. 361, grantee is trustee for vendor; *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 104, 43 L. R. A. (N. S.) 1150.

The grantor would not be a necessary party where his grantee had succeeded to the estate covered by the purchase when the purchaser has a contract of sale and purchase, *Vermont Marble Co. v. Mead*, (Vt.) 80 Atl. 852.

circumstances which would justify a court of equity in holding that notice of election given to a grantee is sufficient.<sup>8</sup>

SEC. 811. SAME. JOINT OR SEVERAL OPTIONORS.—The mere fact that the optionors are the owners of the optioned property as tenants in common, or as joint tenants, does not, as we have seen, clothe any of the tenants with power or authority to give an option upon the common property that will be binding upon any interest except his own. The relation of principal and agent does not exist between tenants so far at least as the right to dispose of the common property is concerned. Nor are they partners.<sup>1</sup> With reference to the subject matter under consideration, the relation between them is not different from that existing between owners of separate and distinct parcels of land, with the consequence that the power of one to sell or dispose of the interest of the other as well as to accept or receive notice of election, must rest upon authority either impliedly or expressly granted.

The form of the option contract may be such that, while all of the optionors join in the same instrument, still the contract of each is several, that is, each agrees separately to grant an option privilege on his interest or estate in the property.

<sup>8</sup> See *Noyes v. Clark*, 7 Paige (N. Y.) 179, 32 Am. Dec. 620, where tender of interest on debt to original creditor was held good though the debt had been assigned and the debtor had notice.

<sup>1</sup> *Pearis v. Covillaud*, 6 Cal. 617, 65 Am. Dec. 543; *Wiswall v. McGowan*, 2 Barb. (N. Y.) 270; *Hungerford v. Cushing*, 8 Wis. 332; *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887, notice to managing partner.

In such case there are as many separate contracts as there are optionors, and consequently, notice of election must be given to each.<sup>2</sup>

On the other hand, if, as is usually the case, all the optionors join in the same instrument in granting an option privilege from which all receive a benefit, the contract, so far as the optionee is concerned, in the absence of anything in the instrument to indicate a contrary intention, is deemed to be joint,<sup>3</sup> that is, the contract imposes upon them, as joint contractors, a joint obligation, in favor of the optionee and, according to some decisions, while as between themselves they still sustain the relation of tenants, that status is a negligible quantity so far as the optionee is concerned. According to this view, notice to one of the co-contractors is notice to all.<sup>4</sup> Other decisions hold that, with reference to the exercise of the option privilege and giving

<sup>2</sup> *Watkins v. Youll*, 70 Neb. 81, 96 N. W. 1042; see *Nott v. Owen*, 86 Me. 98, 29 Atl. 943, 41 A. S. R. 525; *James v. Darby*, 100 Fed. 224, 40 C. C. A. 341.

<sup>3</sup> *Eveleth v. Sayer*, 96 Me. 227, 52 Atl. 639, also holding that the contract can not be treated as joint or several at the option of the promisees; *Gummer v. Mairs*, 140 Cal. 535, 74 P. 26, joint and several; see *Walter v. Rafalsky*, 186 N. Y. 543, 79 N. E. 1118, affirming 98 N. Y. S. 915, 113 App. Div. 223.

<sup>4</sup> *Wright v. Kayner*, 150 Mich. 7, 113 N. W. 779. In this case the minority opinion holds that notice to one of the lessors of the exercise of the option to renew was not sufficient because not given to the other lessor. The majority opinion holds that the lessors were joint contractors, notwithstanding, they were tenants in common and that consequently notice of the election to one of the joint contractors, was sufficient, citing *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121 and *Detlor v. Holland*, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266; *Blood v. Goodrich*, *supra*, was followed in *Rockland-Rockport L. Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, Ann. Cas. 1913B, 62, where it is held that notice of election to one of several "heirs" who was the "managing heir" and who refused to convey, was the refusal of all.

notice by the optionee, the optionors, though tenants in common or joint tenants, do not sustain the relation of principal and agent and that, consequently, notice to one is not notice to all.<sup>5</sup>

Notice to one of two executors who had given an option, is sufficient.<sup>6</sup> A written notice read to both husband and wife (optionors) but addressed to the husband alone, is sufficient when, at the time, it is stated the notice is intended for both.<sup>7</sup>

SEC. 812. SAME. REPRESENTATIVE OF DECEASED OPTIONOR. MINORS.—Death of the optionor does not terminate the option.<sup>1</sup> And if tender is made within the time and at the place appointed in the option, it is sufficient, and the optionee will not be barred from specific performance because of his failure to have a special

<sup>4</sup> The Supreme Court of California, in *Hoover v. Wolfe*, 167 Cal. 337, 139 P. 794, holds to the same rule, the California statute providing that an offer of performance may be made to any one of two or more joint creditors.

<sup>5</sup> *Eisler v. Marshall*, 230 Pa. 208, 79 Atl. 496, notice addressed to all but served on one only; *Rogers v. Burr*, 105 Ga. 432, 31 S. E. 438, 70 A. S. R. 50.

If, as is sometimes said, in support of this view, the obligation of each joint tenant is several, then it would follow that the optionee could be compelled to accept separate deeds from each, rather than one joint deed from all, but see *Lane v. Ziemer*, (Ind. App.) 98 N. E. 741.

Redemption by payment to one joint owner if the land is not available against the other, see *Maddox v. Bramlett*, 84 Ga. 84, 11 S. E. 129.

<sup>6</sup> *Trogden v. Williams*, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867.

<sup>7</sup> *Thompson v. Willard*, 219 Pa. 170, 68 Atl. 46.

<sup>1</sup> See Sec. 709.

Notice is properly given to the administrator, *Hollis v. Libby*, 101 Me. 302, 64 Atl. 621.

administrator appointed.<sup>2</sup> Another case holds that in case of death of the optionor, notice should be given to his administrator,<sup>3</sup> and implies a duty on the part of the optionee to have one appointed.

But it must be apparent that this can not be accepted as a general rule. In the case cited, the election and tender were made at a place other than that expressly fixed by the option, but at the place where the property was redeemable. Technically, therefore, the optionee failed legally to elect. If he had made his demand and tender at the place fixed by the option, or if none had been expressly fixed, then at the place appointed by law, his election would have been good on the authority of the Wisconsin case cited *supra*, for, indeed, it would be a strange legal predicament if, through no fault of his, it should come about there was not sufficient time between the death of the optionor and the expiration of the option time within which the optionee could take the necessary court proceedings to have an administrator appointed, and by reason

<sup>2</sup> *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997, tender is here employed to include election; payment of the price was provided for in the decree.

<sup>3</sup> *Prince v. Robinson's Adm'rs*, 14 Fed. 631.

In *Maughlin v. Perry*, 35 Md. 352, the lessee under a lease giving an option, prior to the expiration of the lease, brought suit for specific performance against the lessor's grantee and the administrator of the original lessor and alleged readiness, etc., to pay the price. This was held sufficient as an election. The court said plaintiff had good ground to go to a court of equity and have all the parties brought in so that upon payment of the money plaintiff would be able to obtain a deed. See, also, *Page v. Hughes*, 41 Ky. (2 B. Mon.) 439.



of this fact, the optionee should lose his option rights.<sup>4</sup>

When, by the terms of the option, notice of election, in case of the death of the optionor, was required to be given to his heirs, notice to one adult heir and his refusal to act, was sufficient, the court saying that no good and sufficient deed could be given unless all of the heirs joined therein.<sup>5</sup>

In another case, the court holds that when the optionor dies during the time limit of the option and before election to purchase, notice of election must be given to his minor heir, even though he could not convey except by guardian under order of the court. The reasoning of the court is that an election is necessary to raise an agreement of sale. The court held, however, that the rule would not apply to tender of the price,<sup>6</sup> as strict tender, in such cases, is not required.<sup>7</sup>

<sup>4</sup> The federal case cited, *supra*, and some other cases, reflect a mistaken notion concerning an election by implying that all the essentials of contract making, such as mutuality of assent, must be present in order to make a good election under an option contract. Clearly this can not be true. The election *turns* the option into a bilateral contract but the election does not *make* the bilateral contract. See Section 814.

<sup>5</sup> *Rockland etc. Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, Ann. Cas. 1913B, 62, also holding that when the lease-option provides that notice of election shall be given to the lessor or his "legal representative," it is to be presumed that executor or administrator is meant. "Personal representatives" as said in a deed, mean those who succeed the grantee in the title of the lands, *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; *Chas. J. Smith Co. v. Anderson*, (N. J. Eq.) 95 Atl. 358, notice to one of the devisees sufficient.

<sup>6</sup> *Mason v. Payne*, 47 Mo. 517; *Woods v. Hyde*, 31 L. J. Ch. 295, 6 L. T. Rep. (N. S.) 317, 10 Wkly. Rep. 339, notice served upon minor heir and guardian.

SEC. 813. ELEMENTS OF ELECTION.—We have said that an election is the act of the optionee which turns the option contract into a binding promise on the part of the optionor to sell. Having determined by whom and to whom the election must be made, it becomes necessary to find out what are the elements of the act which is commonly called “exercising the option.” There must be a decision of the optionee to exercise the option and this decision must be communicated to the optionor. The decision, however, when not an act to be performed<sup>1</sup> is necessarily involved in the act of communicating it, so that, for all practical purposes, it may be said that an election is the timely communication to the optionor, by the optionee, of the intention of the latter to purchase the optioned property, at the price and upon the terms of the option contract, and also a tender of any money and an offer to perform any other act which, by the terms of the option contract, are made part of the act of election.

Depending on the terms of the option and the application of the Statute of Frauds, the communication may be oral, in writing, or it may consist

<sup>6</sup> An election in time and offer—after the death of the lessor—optionor to pay the purchase money entitles the optionee to specific performance as against the heirs and devisees of the former, *Buckwalter v. Klein*, 5 Ohio Dec. 55.

<sup>7</sup> *Rockland etc. Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, Ann. Cas. 1913B, 62.

<sup>1</sup> There may be an election without formal notice, or, in fact any notice, except such as may arise from the act of election itself. Thus, if the option provides as the act of election, the payment by the optionee of a certain sum of money at a certain bank (not the optionor), the payment of the money to the bank constitutes the election without further notice. See Sec. 801, note 2; Sec. 817.

of acts. It must be timely given and at the place appointed by law, or by the terms of the contract, and the election must be upon the precise terms and conditions of the option contract.

SEC. 814. THE ELECTION MUST BE COMMUNICATED.—The purpose of an acceptance is to raise an *offer* to a binding promise on the part of the proposer, and since there can be no agreement and, therefore, no contract arising out of an offer, without meeting of the minds of the parties, it necessarily follows that unless the acceptance is communicated to the proposer, there is no binding promise made, that is, no contract raised.<sup>1</sup> As said in a New York case, a mere mental determination to accept an offer, not communicated by speech or put in course of communication by act, to the other party, is not an acceptance of an offer which will bind the other party.<sup>2</sup>

<sup>1</sup> *Canty v. Brown*, 11 Cal. App. 487, 105 P. 428; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; *Clark v. Harmer*, 5 App. D. C. 114; *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; *Rogers v. Burr*, 105 Ga. 432, 31 S. E. 438, 70 A. S. R. 50, personal to offeree, 31 S. E. 441; *Kibler v. Caplis*, 140 Mich. 28, 103 N. W. 531, 112 A. S. R. 388; *Britton v. Phillips*, 24 How. Pr. (N. Y.) 111.

*Beckwith v. Cheever*, 21 N. H. (1 Fost.) 41, offeree told offerer he would accept if he could get his brother to assist him to cut and take timber of offerer; offeree engaged his brother to assist, but never notified offerer that he had accepted his proposition, and it was held there was no acceptance.

<sup>2</sup> *White v. Corlies*, 46 N. Y. 467; *Trounstone v. Sellers*, 35 Kan. 447, 11 P. 441.

Mere readiness on the part of the purchaser to pay is not sufficient, *Bundy v. Dare*, 62 Iowa 295, 17 N. W. 534.

“Mere communicated mental election to return the stock,” not sufficient, *Olsen v. Northern S. S. Co.*, 70 Wash. 493, 127 P. 112.

With reference to a real option, the purpose of an election is to turn the option into a bilateral contract, but there is this difference between an offer and an option: an offer is a first invitation for a bargain and it does not become a contract until acceptance before withdrawal, the minds of the parties meeting in common agreement, it is said, by virtue of the acceptance. An option is a contract immediately it is concluded, but as best illustrating the point in hand, it may be said it is an agreement giving the optionee the right to turn the option agreement into a contract to convey upon the performance by him of an act called election. In short, an option is a conditional agreement to convey.<sup>3</sup> An election, like an acceptance, must be communicated, but unlike the acceptance of an offer, it is not necessary, to a valid election, that there shall be concurrence of the minds of the parties to raise the bilateral contract.<sup>4</sup>

It is competent for the parties to dispense with notice or communication of the acceptance or the election, as where, upon doing some overt act, the contract is to become binding,<sup>5</sup> such as payment or tender of the price, at the place appointed by the option,<sup>6</sup> or the payment of a particular note,<sup>7</sup> or election at a particular time and place.<sup>8</sup>

<sup>3</sup> Page v. Martin, 46 N. J. Eq. 585, 20 Atl. 46.

<sup>4</sup> See Sec. 801, note 2.

<sup>5</sup> See *Mactier Adm'rs v. Firth*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *First Nat'l Bank v. Watkins*, 154 Mass. 385, 28 N. E. 275.

<sup>6</sup> *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997.

<sup>7</sup> *Burt v. Henry*, 10 Ala. 874.

<sup>8</sup> *Omer v. Farlow*, 46 Ill. App. 122, holding attendance, at the time and place fixed, was a good election, the optionor himself being absent.

SEC. 815. TERMS OF OPTION CONTROL MODE OF ELECTION.—It is competent for the optionor to provide in the option that notice of election shall be given to himself, to a corporation, or to a third person;<sup>1</sup> or to his heirs;<sup>2</sup> that it shall be in writing;<sup>3</sup> the time when, the place where, notice and tender shall be made;<sup>4</sup> and generally, to impose such other conditions as he may desire.<sup>5</sup> These stipulations and provisions are binding upon the optionee, and his election must be in accordance therewith.<sup>6</sup> But, in the absence of express provisions, the election must be communicated to the optionor and at the time and place implied by law.<sup>7</sup>

<sup>1</sup> Rockland-Rockport L. Co. v. Leary, 203 N. Y. 469, 97 N. E. 43, Ann. Cas. 1913B, 62.

<sup>2</sup> Rockland etc. Co. v. Leary, *supra*.

<sup>3</sup> See Sec. 816.

<sup>4</sup> Mueller v. Nortmann, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997; Mercer El. Mfg. Co. v. Conn. El. Mfg. Co., 87 Conn. 691, 89 Atl. 909; Vermont Marble Co. v. Mead, (Vt.) 80 Atl. 852, place of acceptance; see Olsen v. Northern S. S. Co., 70 Wash. 493, 127 P. 112.

<sup>5</sup> Winders v. Kenan, 161 N. C. 628, 77 S. E. 687, payment of price.

An offer by letter, concluding, "Let me know by return mail," requires an acceptance by return mail, Ackerman v. Maddux, 26 N. D. 50, 143 N. W. 147.

Where a proposal requires acceptance by "wire or otherwise," a verbal acceptance or one by telegram is sufficient, Watson v. Coast, 35 W. Va. 463, 14 S. E. 249.

Provision as condition of election that optionee could comply with the conditions of the option as to ability to pay price, etc., Washington v. Rosario M. & W. Co., 28 Tex. Civ. App. 430, 67 S. W. 459.

<sup>6</sup> Breen v. Mayne, 141 Iowa 399, 118 N. W. 441; Sawyer v. Brossart, 67 Iowa 678, 25 N. W. 876, 56 A. S. R. 371.

If the offer directs that the acceptance be sent by the messenger who brings the offer, or by mail, or by telegraph, it must be so sent, to be effective, Carr v. Duvall, 14 Pet. 77 (U. S.).

<sup>7</sup> Canty v. Brown, 11 Cal. App. 487, 105 P. 428, the reasonable or usual mode, Civil Code Cal., Sec. 1582.

**SEC. 816. WRITTEN OR ORAL ELECTION OR ACCEPTANCE.**—Communication of the election, by the optionee to the optionor, by word of mouth, as well as an oral acceptance of an offer, is sufficient in all cases except these: (a) where written notice is required by the terms of the option contract;<sup>1</sup> (b) where a particular act, such as payment of the price, is, by the terms of the option contract, prescribed as the mode of election;<sup>2</sup> (c) where, in some jurisdictions, a writing is necessary to meet the requirements of the Statute of Frauds.

An oral election as being within or without the Statute of Frauds is presented in a preceding Chapter,<sup>3</sup> and the result of the presentation may be summarized by saying that, in most jurisdictions, it is held an oral election of a written option contract, the subject matter of which falls within

<sup>1</sup> *Bosshardt & W. Co. v. Crescent Oil Co.*, 171 Pa. 109, 32 Atl. 1120; *Eastman v. Dunn*, 34 R. I. 516, 83 Atl. 1057; *Turner v. McCormick*, 56 W. Va. 161, 49 S. E. 28, 107 A. S. R. 904, 67 L. R. A. 853; *Beller v. Robinson*, 50 Mich. 264, 15 N. W. 448; *Cambria Iron Co. v. Leidy*, 226 Pa. 122, 75 Atl. 186, whether given is question of fact. But written notice may be waived by the optionor, *McClelland v. Rush*, 150 Pa. 57, 24 Atl. 354; *Wood v. Edison El. Ill. Co.*, 184 Mass. 523, 69 N. E. 364.

See *Seaver v. Thompson*, 189 Ill. 158, 59 N. E. 553, holding stipulation in lease requiring written notice of lessor's decision not to build, was for benefit of lessee, which he could waive, and it is waived by receiving rent after the expiration of the lease, *Probst v. Rochester S. L. Co.*, 171 N. Y. 584, 64 N. E. 504.

The written notice need not be subscribed by the optionee when the writing or the circumstances in connection therewith identify it as the notice called for by the option, see *Wiener v. H. Graff & Co.*, 7 Cal. App. 580, 95 P. 167; citing *Carleton v. Hobart*, 14 Wkly. Rep. 772.

<sup>2</sup> See Secs. 817, 839, 914, 924.

<sup>3</sup> Chapter IV, Secs. 414, 415.

the Statute, fully meets the requirements of that Statute.

SEC. 817. COMMUNICATION OF ELECTION BY ACT.—To make a contract having mutuality, the law requires that the minds of the parties shall meet in one and the same intention. When the parties reach this point in their negotiations they have arrived at agreement and a contract is made. The negotiations for the contract take the form of a proposal, or offer, by one party to the other. Acceptance is the act which vitalizes the offer and gives it legal life as a contract. Excepting the Statute of Frauds and, also, the express provisions of the offer, the acceptance, or as applied to options, the election, may be manifested to the proposer, or optionor, by an act of the other party which presents to his mind the present intention of that party to accept the offer or to exercise the option. This act may be neither word nor writing but conduct simply and only.<sup>1</sup>

As said by the Supreme Court of West Virginia,<sup>2</sup> the election may consist of such acts to be done, which the optionor has expressly or impliedly

<sup>1</sup> Acceptance may be by writing by words or by acts, *Houghwout v. Boisaubin*, 18 N. J. Eq. 315.

Acceptance may be shown by acts of the parties, *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057.

Acceptance may be inferred from conduct, *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

Acceptance by settling upon the land and making improvements, *Boyd v. Brinckin*, 55 Cal. 427.

<sup>2</sup> *Weaver v. Burr*, *supra*; delivery of notes, *Cutting v. Dana*, 25 N. J. Eq. 265; ordering goods, *Huggins v. Southeastern L. & C. Co.*, 121 Ga. 311, 48 S. E. 933.

offered to treat as a communication, instancing the deposit of a letter in the post office in a case where the offer is made by post.

So, an election may consist of the mere act of making or tendering payment of the price at the place appointed by the option,<sup>3</sup> or of any act which the parties have stipulated for as election or notice, as, also, any act, other than a promise to be made, the performance of which is induced by the proposal.<sup>4</sup>

SEC. 818. COMMUNICATION OF ELECTION BY POST OR TELEGRAPH.—Where negotiations for an option are conducted and concluded personally by the parties as also where the offer is personally made by the proposer to the other party, it is implied as a matter of law that the election or acceptance must be made personally to the proposer or optionor and it is not binding upon him until actually communicated.<sup>1</sup>

3 *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997; *Raddatz v. Florence Inv. Co.*, 147 Wis. 636, 133 N. W. 1100; see *Kaufman v. All Persons*, 16 Cal. App. 388, 117 P. 586.

4 *Schmitt v. Weil*, 46 Ind. App. 264, 92 N. E. 178, subscribing for stock under proposal by president to re-pay subscription amount.

But this rule does not apply to a case where the offeree is given the right, on the happening of a particular event, to decide to accept the offer made. In such case, the contract is not completed on the happening of the event until the decision is made, *Mactier v. Frith*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; see also *Hill v. Mathews*, 73 Mich. 377, 44 N. W. 286.

1 *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

Where the proposal is made personally and the parties reside in different states, it is implied that acceptance may be by letter, *Wileox v. Cline*, 70 Mich. 517, 38 N. W. 555.



Where, however, in other cases, negotiations are begun and carried on through the post, or by telegraph,<sup>2</sup> or other similar means of communication,<sup>3</sup> the rule is that the acceptance, or election, may be communicated to the other party by the same mode of communication, the explanation being that the proposer by adopting a particular carrier to communicate his message thereby impliedly authorizes the other party to accept or elect by the same carrier.<sup>4</sup>

A contract is raised when the acceptance or election, not consisting of an act, is communicated, and this is true both where the negotiations are conducted personally by the parties and where the negotiations are carried on by messenger or carrier, but it is to be observed that the law, in order to make it possible to conclude a contract by post, for instance, holds that the acceptance is completed and the contract raised, the instant it is deposited with the carrier,<sup>5</sup> whether or not the acceptance is

<sup>2</sup> *Stevenson v. McLean*, 5 Q. B. D. 346.

An offer by telegram impliedly requires a quick reply by telegram, *Thompson v. Burns*, 15 Idaho 572, 99 P. 111.

<sup>3</sup> Oral message, *Stevenson v. McLean*, *supra*; public carrier, *Gottlieb v. Rinaldo*, 78 Ark. 123, 93 S. W. 750, 6 L. R. A. (N. S.) 273.

Telegram as acceptance of offer made by letter, *Beggs v. James Hanley Brewing Co.*, 27 R. I. 385, 62 Atl. 737, 114 A. S. R. 44.

Letter by post as acceptance of offer by telegram, *Farmers' Produce Co. v. McAlester Storage & Com. Co.*, (Okl.) 150 P. 483, holding sufficient when acceptance by wire not inferred from offer by wire.

<sup>4</sup> *Wester v. Casein Co. of America*, 206 N. Y. 506, 100 N. E. 488; *Ann. Cas.* 1914B, 377; *W. U. T. Co. v. Williams*, 57 Tex. Civ. App. 267, 137 S. W. 148.

<sup>5</sup> *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Moore v. Pierson*, 6 Iowa 279, 71 Am. Dec. 409; *Weaver v. Burr*, *supra*; *Chiles v. Nelson*, 7 Dana 281, (Ky.); *Stevenson v. McLean*, *supra*.

actually received by the proposer<sup>6</sup> and regardless of error<sup>7</sup> or delay<sup>8</sup> by the telegraph company, in transmission.

SEC. 819. SAME, CONTINUED.—To be effective the letter must actually be placed in the post office, directed to the party making the offer and at the proper place;<sup>1</sup> and postage thereon prepaid,<sup>2</sup> for if directed to a place where the optionor only sometimes resides, it is not within the rule and, in such case, proof of actual receipt of the communication must be made as in other cases.<sup>3</sup> An offer by mail may provide that the contract shall be binding when the acceptance is received,<sup>4</sup> and in

<sup>5</sup> Unless a formal writing embodying all the terms of the contract is a condition precedent to its existence, *Mereer Elec. Mfg. Co. v. Connecticut Elec. Mfg. Co.*, 87 Conn. 691, 89 Atl. 909; or the offer reserves the right to withdraw by posted letter, *Byrne v. Van Tienhoven*, L. R. 5 C. P. Div. 344, 49 L. J. C. P. 316, 42 L. T. (N. S.) 371.

Case where acceptance by wire was to be followed by letter, *Long v. Needham*, 37 Mont. 408, 96 P. 731.

As a result of the rule of the text the optionee may not retract her acceptance after she has posted her letter of acceptance, *Linn v. McLean*, 80 Ala. 360.

<sup>6</sup> *Weaver v. Burr*, *supra*; *Rogers v. Burr*, 105 Ga. 432, 31 S. E. 438, 70 A. S. R. 50; *Mereer Elec. Mfg. Co. v. Connecticut Elec. Mfg. Co.*, *supra*; *W. U. T. Co. v. Williams*, 57 Tex. Civ. App. 267, 137 S. W. 148, telegram; *Washburn v. Fletcher*, 42 Wis. 152.

<sup>7</sup> *Watson v. Paschall*, 93 S. C. 537, 77 S. E. 291.

<sup>8</sup> *Postal Telegraph Cable Co. v. Louisville C. S. Oil Co.*, 140 Ky. 506, 131 S. W. 277, or lost.

<sup>1</sup> *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Potts v. Whitehead*, 20 N. J. Eq. 55, affirmed 23 N. J. Eq. 512.

<sup>2</sup> *Britton v. Phillips*, 24 How. Pr. (N. Y.) 111.

<sup>3</sup> *Potts v. Whitehead*, *supra*.

<sup>4</sup> *Mercer Elec. Mfg. Co. v. Connecticut Elec. Mfg. Co.*, 87 Conn. 691, 89 Atl. 909.

such case the rule under consideration does not apply.

An acceptance or election by post or telegraph is good in all cases, that is, where the offer is made by post or telegraph as well also as where a written proposal or oral offer, expressing or implying a future time to accept, is made personally. But in the latter cases the notice becomes effective as an acceptance, not from the instant of its deposit in the post office, or its acceptance for transmission by the telegraph company, but only upon its actual receipt by the proposer or optionor. The consequence is that if, in such cases, the letter is received after the expiration of the time limit, it is too late, notwithstanding it was posted prior to the expiration of the option time.<sup>5</sup>

**SEC. 820. PLACE OF ELECTION OR ACCEPTANCE.**—If the option designates the place of election or acceptance, the election or acceptance must be made at that place. Thus, an offer to buy

<sup>5</sup> Kibler v. Caplis, 140 Mich. 28, 103 N. W. 531, 112 A. S. R. 388, telegram.

Where the optionor and optionee reside in different states and the offer is in writing personally delivered, it would seem there is an implied right of acceptance by letter, and if actually received in time, it is sufficient, Wilcox v. Cline, 70 Mich. 517, 38 N. W. 555.

Where optionor evades, Holmes v. Myles, 141 Ala. 401, 37 So. 588.

Where the optionee properly mailed notice, it is presumed that the optionor received it, but the presumption may be rebutted, Bluthenthal v. Atkinson, 93 Ark. 252, 124 S. W. 510.

Where a telegram is delivered to the telegraph company and accepted by the operator for transmission, there is a presumption that it has been duly forwarded and received by the addressee, Kibler v. Caplis, *supra*.

The telegram must be paid for and delivered to the telegraph company, Price v. Atkinson, 117 Mo. App. 52, 94 S. W. 816.

flour stated that the answer should be returned by the same wagon by which the offer was sent. The acceptance was not sent by the return wagon but was mailed at a place which was not the destination of the wagon and was duly received. It was held the acceptance was not sufficient because it was not sent to the place specified in the offer.<sup>1</sup>

If the place of acceptance or election is not expressly fixed by the terms of the proposal or option and the optionor can not be found, or evades, it is believed the optionee has fully and duly performed by giving seasonable notice at the residence or usual place of business of the optionor.<sup>2</sup> And further, that a communication to him personally anywhere he is found is good. And the same is true of an option which expressly fixes the place, where, at the time, the optionor does not object to the acceptance or election upon that ground.

Notice at the appointed place and to the person named in the option to receive it, is good, notwithstanding the previous death of the optionor,<sup>3</sup> or the

<sup>1</sup> Eliason v. Henshaw, 4 Wheat. (U. S.) 228; Vermont Marble Co. v. Mead, (Vt.) 80 Atl. 852.

<sup>2</sup> Cusack v. Gunning System, 109 Ill. App. 588; Canty v. Brown, 11 Cal. App. 487, 105 P. 428; Herman v. Winter, 20 S. D. 196, 105 N. W. 457; Boynton v. Woodbury, 101 Mass. 346.

When the optionor evades, etc., see Sec. 933.

Under an agreement to repurchase, at the option of the buyer, election and tender of deed of re-conveyance must be made by the buyer at the residence of the seller where the land is situated and where the contract is to be performed, Curtis v. Sexton, 142 Mo. App. 179, 125 S. W. 806.

<sup>3</sup> Mueller v. Nortmann, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997; see Levin v. Dietz, 194 N. Y. 376, 87 N. E. 454, 20 L. R. (N. S.) 251.

absence of the optionor.<sup>4</sup> When the optionor gave the optionee his address telling him to communicate any matters relative to the premises, notice of election mailed to the address given, on the day the time to give notice expired, is good though not received until a day or two later.<sup>5</sup>

### SEC. 821. ELECTION MUST BE DEFINITE.

—The subject matter of this section does not involve the rule applicable to conditional elections or acceptances. Apart from the requirements of the latter rule,<sup>1</sup> the election or acceptance must be definite and certain. Thus, an acceptance of an offer to receive and transport, “not exceeding 6000 tons gross” in general terms, without specifying the amount, is not sufficient as the number of tons should be specified.<sup>2</sup> So, an election to continue water service from month to month for three years, reserving the right to continue the service thereafter, is too indefinite, under an agreement to supply water for three years or longer at the option of the parties,<sup>3</sup> but notice of election by letter to the optionor that the optionee was ready to have the whole amount of coal delivered, under an option to purchase 2000 tons of coal to be shipped from Port Richmond, is sufficient though no direction is given when to ship.<sup>4</sup>

<sup>4</sup> Omer v. Farlow, 46 Ill. App. 122.

<sup>5</sup> Reed v. John, 2 Daly (N. Y.) 213; see also Holmes v. Myles, 141 Ala. 401, 37 So. 588.

<sup>1</sup> See Sec. 840, *et seq.*

<sup>2</sup> Chicago etc. R. R. Co. v. Dane, 43 N. Y. 240.

<sup>3</sup> Christian etc. Co. v. Bienville etc. Co., 106 Ala. 124, 17 So. 352.

<sup>4</sup> Snelling v. Hall, 107 Mass. 134.

SEC. 822. ELECTION AS TO PART OF PROPERTY.—In the absence of a provision in the option contract authorizing an election to purchase part of the property covered by the option, the optionee is not entitled to elect to purchase less than the whole, which is another way of saying that the election, by the optionee, must conform with the terms of the option.<sup>1</sup> An option on 5 lots at the price of \$500 each, in consideration of the perfection of the title by the optionee, does not give the optionee the right to purchase any one of the lots unless he perfects the title to all.<sup>2</sup> However, the option may be so drawn as to permit election of a part of the property.<sup>3</sup> Thus, under an option to purchase certain property, including accounts receivable, at a certain percentage of their face value, and a special agreement providing for an inventory of the accounts to be made by the seller, the buyer can elect to purchase the other property without announcing his election to take the accounts, until the inventory has been completed and submitted to him.<sup>4</sup>

<sup>1</sup> *Hitchcock v. Page*, 14 Cal. 440; *Reynolds v. Hooker*, 76 Vt. 184, 56 Atl. 988, option on real and personal property; *Rehm-Zeiber Co. v. F. G. Walker Co.*, 156 Ky. 6, 160 S. W. 777; *Mershon v. Williams*, 62 N. J. L. 779, 42 Atl. 778, election to renew for one year of a term of four years; *Vickers v. City of Baltimore*, 102 Md. 487, 63 Atl. 120, and specific performance will not be granted.

<sup>2</sup> *Dupuy v. Williams*, 152 Ill. 102, 37 N. E. 48; *Brooks v. Miller*, 103 Ga. 712, 30 S. E. 630, case where option covered an undivided interest in lots and optionee undertook to have partition made.

<sup>3</sup> *Watkins v. Youll*, 70 Neb. 81, 96 N. W. 1042; *Worch v. Woodruff*, 61 N. J. Eq. 78, 47 Atl. 725.

<sup>4</sup> *Baker v. Shaw*, 68 Wash. 99, 122 P. 611.

Option to purchase any number of acres of parcel described, *Madden v. City of Boston*, 177 Mass. 350, 58 N. E. 1024.

In another case<sup>5</sup> the option was construed to allow the optionee to elect to purchase a part of the several tracts of land described, and it was held that such election made the option a binding contract for all the tracts. And the same conclusion was reached in another case<sup>6</sup> where payment was made of the first installment for stock to be delivered and paid for in parcels or blocks.

SEC. 823. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. GENERALLY.—The communication of the fact that the optionee exercises his option right is not required to be in any particular form unless by virtue of the provisions of the option contract. With the qualification just made, it may be laid down as a rule that any act signified to the optionor which brings to his mind the present intention of the optionee to exercise the option privilege, is sufficient.<sup>1</sup> Thus, where a license for the exclusive use of a process allows the licensee, within one year, to elect either to abandon or continue it, and he sues, within the year, to restrain a violation of it by the licensor, such act constitutes a final election to continue the license.<sup>2</sup>

<sup>5</sup> Fink v. Hough, (Tex. Civ. App.) 153 S. W. 676; Baker v. Shaw, *supra*.

<sup>6</sup> Obery v. Lander, 179 Mass. 125, 60 N. E. 378; see also Reed v. Hickey, 13 Cal. App. 136, 109 P. 38.

<sup>1</sup> Parker v. Seeley, 56 N. J. Eq. 110, 38 Atl. 280, devisee and optionee under will; case where, when time to exercise option arrived optionee was on his death bed and subsequently died. During such time he was not able to attend to any business, but it appeared he had made up his mind to elect and the trustee under the will knew that fact and this was held good without a formal declaration of an intention to elect.

<sup>2</sup> Buhl v. Stephens, 84 Fed. 922.

So, a tender to the optionor of the cash payment and of the note and mortgage called for by the option, is sufficient notice of the exercise of the option;<sup>3</sup> as also tendering and offering for execution a deed within the time limit;<sup>4</sup> marking the trees optioned and offering to pay the price;<sup>5</sup> demanding payment of note;<sup>6</sup> and making payments under the terms of the option.<sup>7</sup>

On the other hand, it is held that the following acts do not constitute an election: commencing to make repairs on the leased property by the lessor without the consent of the lessee under a lease providing that if the lessor should begin certain repairs the lessee should be bound to purchase;<sup>8</sup> advertising by the optionee to sell the property at auction;<sup>9</sup> gift of piano under lease and option to purchase.<sup>10</sup>

SEC. 824. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. STATEMENTS AND CONVERSATIONS.—The election must be unequivocal. Thus, where at the request of the

<sup>3</sup> *Souffrain v. McDonald*, 27 Ind. 269.

<sup>4</sup> *Scott v. Shiner*, 27 N. J. Eq. 185.

<sup>5</sup> *Paddock v. Davenport*, 107 N. C. 710, 12 S. E. 464.

<sup>6</sup> *Favorite Carriage Co. v. Walsh*, 71 Minn. 292, 74 N. W. 137.

<sup>7</sup> *Obery v. Lander*, 179 Mass. 125, 60 N. E. 378; *Smith v. Post*, 167 Cal. 69, 138 P. 705; *Reed v. Hickey*, 13 Cal. App. 136, 109 P. 38.

Acceptance of report of engineer, *Knisely v. Leathe*, (Mo.) 178 S. W. 453.

Taking possession and removing property, *Lord v. Miller*, (Wash.) 150 P. 631.

<sup>8</sup> *Smith v. Fisher*, 33 N. Y. S. 1059, 87 Hun. 129.

<sup>9</sup> *Thacher v. Weston*, 197 Mass. 143, 83 N. E. 360.

<sup>10</sup> *Powell v. Eckler*, 96 Mich. 538, 56 N. W. 1.



optionor, the optionee is asked what his intentions are with reference to exercising the option, and in the presence of the optionor, he replies "I have been a good fellow so far and I guess I will have to take the land," such statement does not constitute a sufficient election, as it amounts merely to an expression of opinion as to what the optionee intends to do in the future.<sup>1</sup> Nor, is there an election where the optionee merely demands to be informed as to the cost of the property;<sup>2</sup> or requests an extension of the option time so that an estimator can be sent to inspect timber;<sup>3</sup> or makes complaint with respect to the merchandise;<sup>4</sup> or states that possession would be taken on a date different from that stipulated in the option.<sup>5</sup>

But a statement by the optionee that he wishes to avail himself of his right to purchase under the option and is ready to pay the agreed price, is sufficient.<sup>6</sup> So, where the optionee advises the optionor that the manufacturing company for which the property was optioned has decided to locate its plant and that the optionee desires to exercise the option and is ready to pay the price.<sup>7</sup> So, where under an agreement by seller to repurchase, if the purchaser was dissatisfied, a statement

<sup>1</sup> *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441.

<sup>2</sup> *Stokes v. Carpenter*, 151 N. Y. S. 1000, 166 App. Div. 441.

<sup>3</sup> *Seymour v. Canfield*, 122 Mich. 212, 80 N. W. 1096; see *Beckwith v. Cheever*, 21 N. H. (1 Fost.) 41.

<sup>4</sup> *Ide v. Brody*, 156 Ill. App. 479, sale and return.

<sup>5</sup> *Routledge v. Grant*, 4 Bing. 653, 13 E. C. L. 678, 130 Eng. Reprint 920.

<sup>6</sup> *Pearson v. Millard*, 150 N. C. 303, 63 S. E. 1053.

<sup>7</sup> *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413.

by the purchaser to the seller that he desires a reconveyance, that he is of the same opinion as when "the transaction was had," and to "get your money ready."<sup>8</sup> So, where the optionee demands payment of the notes of the optionor called for by the agreement,<sup>9</sup> or informs the lessor-optionor that he desires the premises for the additional term.<sup>10</sup>

SEC. 825. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. LETTERS AND OTHER WRITINGS.—A letter written by the optionee stating he is ready to "close the option" at a time subsequent to the expiration of the option time limit, is not an election.<sup>1</sup>

A mere notice by the lessee under a lease giving him the right to make "arrangements" with the lessor for renewal for another term, that at the proper time, he intends to assert his rights under the renewal clause for another term, without further making any "arrangements," is not a renewal of the lease.<sup>2</sup>

Where the lessee, under a lease of a theatre which gave him the right to lease the premises for a further term, wrote the lessor that he would continue the theatre, and the lessor replied he understood this to mean that the lessee would continue to rent the theatre "as per terms of contract," and the

<sup>8</sup> *Burner v. Burner*, 155 Va. 484, 79 S. E. 1050.

<sup>9</sup> *Favorite Carriage Co. v. Walsh*, 71 Minn. 292, 44 N. W. 137.

<sup>10</sup> *House v. Burr*, 24 Barb. (N. Y.) 525.

<sup>1</sup> *Indiana & Ark. L. & Mfg. Co. v. Pharr*, 82 Ark. 573, 102 S. W. 686.

<sup>2</sup> *Christiana Feigenspan v. Popowska*, 75 N. J. Eq. 342, 72 Atl. 1003.

lessee continued in the possession and use of the theatre, there was a sufficient exercise of the right of renewal.<sup>3</sup>

Where, by a clause added to an option, which clause was signed by the optionee, he agreed "to the above terms and to pay the balance within seven days (the stipulated time) there is an acceptance."<sup>4</sup> So, where the parties sign and deliver the agreement;<sup>5</sup> or the optionee endorses his acceptance on the option, the optionor also endorsing thereon acceptance of notice and stating the contract is made absolute, notwithstanding the option required the signature of the optionor's wife who refused to sign.<sup>6</sup>

Defendant gave plaintiff a written option to purchase stock for \$3100 cash and the balance on time. On the last day of the option, plaintiff said he would take the stock "according to the terms of the writing," but defendant, desiring to get a portion of the stock from the pledgee, endorsed an extension of eleven days on the agreement. After such extension, plaintiff let defendant have \$3100 to get the pledged stock, but defendant failed to do so, and after the expiration of the option, defendant demanded a return of the \$3100, and it was held there was no "acceptance" of the option.<sup>7</sup>

<sup>3</sup> *Parker v. Gortatowsky*, 127 Ga. 560, 56 S. E. 846.

<sup>4</sup> *Goldberg v. Drake*, 145 Mich. 50, 108 N. W. 367; the clause followed the signature of the optionor and was not signed by the optionee in the presence of the optionor.

<sup>5</sup> *Cummings v. Nielson*, 42 Utah 157, 129 P. 619.

<sup>6</sup> *Thompson v. Craft*, 238 Pa. 125, 85 Atl. 1107.

<sup>7</sup> *Buttner v. Smith*, (Cal.) 36 P. 652.

**SEC. 826. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. ORDINANCES BY MUNICIPALITIES, ETC.**—An election by a city to exercise the option to purchase a waterworks plant, at the expiration of the franchise, can not be inferred from the adoption of an ordinance by it providing for an appraisement and the fixing of water rates and for submitting, to a special election, the question whether the city should purchase, and whether a new franchise should be granted, when nothing was done under the appraisement, and the city failed to fix the schedule of water rates.<sup>1</sup> But the vote of a town to purchase the option property is an election;<sup>2</sup> the vote completes the purchase.<sup>3</sup> So, also, is the vote of a board of street commissioners to purchase, from the owner, certain land for school purposes;<sup>4</sup> but it is otherwise where the vote was intended as preliminary to a contract of purchase.<sup>5</sup>

**SEC. 827. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. POSSESSION AND IMPROVEMENTS.**—The rule on this subject is

<sup>1</sup> *City and County of Denver v. New York Trust Co.*, 229 U. S. 123, 57 L. Ed. 1101, 33 S. Ct. 657, reversing 187 Fed. 890, 11 C. C. A. 224; the point in this case was that the city having an option on the plant must elect under the option.

<sup>2</sup> *Town of Bristol v. Waterworks*, 25 R. I. 189, 55 Atl. 710; *Town of Southington v. Water Company*, 80 Conn. 646, 69 Atl. 1023.

<sup>3</sup> *Rockport Water Co. v. Rockport*, 161 Mass. 279, 37 N. E. 168.

<sup>4</sup> *McManus v. City of Boston*, 171 Mass. 152, 50 N. E. 607.

<sup>5</sup> *Madden v. City of Boston*, 177 Mass. 350, 58 N. E. 1024.

laid down in an Illinois case.<sup>1</sup> In that case the owner gave to another an option to select and purchase a portion of his lands, at a stipulated price, by the terms of which the optionee was to make the selection within a given time, and pay taxes, and make improvements, and pay the purchase money, upon the performance of which the owner agreed to convey. The court held the option was “accepted” when the optionee had done what he was required to do by the terms of the option. In the cited case all the acts to be done were referable to the option itself and were done under and in pursuance of its terms. The case differs, therefore, from one where possession is taken under a lease containing an option on the usual terms. In the latter case, the possession of the land, as well as fencing the same and paying taxes, may be referable to the relation of landlord and tenant, and if so, they do not constitute an election.<sup>2</sup> Taking possession, under a bond for a mining claim, and making improvements without objection from the obligor, is not the equivalent of an election to pur-

<sup>1</sup> *Perkins v. Hadsell*, 50 Ill. 216, distinguishing *Boucher v. Van Buskirk*, 9 Ky. (2 A. K. Marsh) 345, on the ground that the improvements were not made, and referring to *Lawrenson v. Butler*, 1 Sch. & Lef. 13, as often overruled.

See *Byers v. Denver C. R. Co.*, 13 Colo. 552, 22 P. 951, holding that taking possession under the contract was an election; *Bogle v. Jarvis*, 58 Kan. 76, 48 P. 558.

<sup>2</sup> *Sutherland v. Parkins*, 75 Ill. 338; see *L'Engle v. Overstreet*, 61 Fla. 653, 55 So. 381; *Mills v. Haywood*, L. R. 6 Ch. Div. 196; *Myers v. J. J. Stone & Son*, 128 Iowa 10, 102 N. W. 507, 111 A. S. R. 180, 5 Ann. Cas. 912.

*Richardson v. Harkness*, 59 Wash. 474, 110 P. 9, holding that possession under lease with option to purchase is possession under option within the rule.

chase, nor is it performance.<sup>3</sup> The fact that the optionee made some improvements upon the land during the term of the lease containing an option to purchase, does not entitle him to the option which he has forfeited by failure to exercise it in time.<sup>4</sup> An option gives the optionee no interest, either legal or equitable, in the land, and the fact that the optionee takes possession and makes improvements without having complied with the option agreement, does not make the contract a sale nor give him any interest in the land.<sup>5</sup>

The act we are here considering is one sufficient to constitute an election under the option. In a general way the rule above laid down with reference to the possession of land, is applicable to personal property. Thus, under an option for the purchase of personal property consisting of railroad equipment, there is an election, where, within the option time, the optionee takes possession and removes the property.<sup>6</sup>

**SEC. 828. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. SALE AND RETURN. SALE ON TRIAL OR APPROVAL. BAILMENT. GENERALLY.**—In another place we

<sup>3</sup> *Gordon v. Darnell*, 5 Colo. 302.

*Champion etc. Co. v. Champion Mines*, 164 Cal. 205, 128 P. 315, there was non-payment of installments of price; see *Ellsworth v. So. Minn. R. Ex. Co.*, 31 Minn. 543, 18 N. W. 822; *Reed v. Hickey*, 13 Cal. App. 136, 109 P. 38; *Curran v. Rogers*, 35 Mich. 221; nor is possession and trimming of trees, *Wright v. Kaynor*, 150 Mich. 7, 113 N. W. 779.

<sup>4</sup> *Atlantie Product Co. v. Dunn*, 142 N. C. 471, 55 S. E. 299; see *Boyd v. Brinekin*, 55 Cal. 427.

<sup>5</sup> *Bostwick v. Hess*, 80 Ill. 138.

<sup>6</sup> *Lord v. Miller*, (Wash.) 150 P. 631.

have pointed out the distinction between sale and return, on the one hand, and sale on trial or approval, or bailment with option to purchase, on the other,<sup>1</sup> and noted that under the former, as a general rule, the title to the property vests in the purchaser immediately, while under the latter, the title does not vest until the purchaser approves the fitness and quality of the property, that is, exercises the option privilege to purchase.<sup>2</sup>

In transactions involving a common option to purchase, and some others, the failure of the optionee to exercise the option privilege within the time limit, puts an end to his rights under the option. In the cases under consideration in this and the following sections, failure on the part of the purchaser, depending of course on the terms of the contract and the facts, usually, and where there has been some act on the part of the purchaser, such as exercising acts of ownership over the property after expiration of the time limit, quite uniformly results, as held by the courts, in an election to purchase, that is, completes the transaction as an absolute sale and purchase.<sup>3</sup>

<sup>1</sup> See Sec. 507.

<sup>2</sup> See Sec. 507; see also *Rumpf v. Barto*, 10 Wash. 382, 38 P. 1129, bailment of jewelry for "inspection."

<sup>3</sup> Where written notice of dissatisfaction is required by the contract, such notice may be waived by the seller, *Continental Gin Co. v. Sullivan*, (Okla.) 150 P. 209.

A sale with option to return, in a certain contingency, becomes absolute, if the purchaser, in the meantime disables himself (mortgages the property) from performing the condition, *Lynch v. Willford*, 57 Minn. 377, 59 N. W. 311.

SEC. 829. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. AGREEMENTS TO REPURCHASE. AGREEMENTS AND OPTIONS INVOLVING SHARES OF STOCK AND BONDS.—Under an agreement to repurchase there is no absolute contract on the part of the seller to repurchase; the purchaser merely has an option which is lost if not exercised within the time limit and in accordance with the terms of the contract.<sup>1</sup>

In accordance with the general rule, the following acts involving options to return, are held to constitute an election to retain the property: failure of the purchaser to return the shares of stock within the fixed time, under an agreement to return the shares or pay for them;<sup>2</sup> and collecting dividends on the stock after the expiration of the time limit.<sup>3</sup>

Notice of intention to return the shares of stock, given within the stipulated time, is not sufficient, as tender of the shares, within the time, is also necessary;<sup>4</sup> but a letter from the purchaser stating

<sup>1</sup> *Magoffin v. Holt*, 62 Ky. (1 Duv.) 96; *Scott v. Goodin*, 21 Cal. App. 178, 131 P. 76.

<sup>2</sup> *Guss v. Nelson*, 200 U. S. 298, 50 L. Ed. 489, 26 S. Ct. 260; *Haskins v. Dern*, 19 Utah 89, 56 P. 953; *Bovee v. Boyle*, 25 Colo. App. 165, 136 P. 467, pleading; *Page v. Shainwald*, 169 N. Y. 246, 62 N. E. 356.

The provision in the agreement to pay for the shares adds nothing to the point; this could be discharged by timely election and return, *Stevens v. Hertzler*, 109 Ala. 423, 19 So. 838.

Request for extension of time is not waiver of tender of stock, *Alexander v. Bosworth*, (Cal. App.) 147 P. 607.

<sup>3</sup> *Laughlin v. U. S. Rolling Stock Co.*, 64 Fed. 25.

<sup>4</sup> *Olsen v. Northern S. S. Co.*, 70 Wash. 493, 127 P. 112; see *Orvis v. Waite*, 58 Ill. App. 504; *Malsby v. Young*, 104 Ga. 205, 30 S. E. 854; *Alexander v. Bosworth*, (Cal. App.) 147 P. 607.



that the purchaser is dissatisfied and asking for his money back and to come and take the stock, is not only an election to return but also a tender of the stock under the Iowa Statute.<sup>5</sup> Tender and return of the bonds and demand of re-payment, are sufficient as notice of dissatisfaction.<sup>6</sup>

Under an agreement between a railroad corporation and a director, it was agreed to pay him a certain sum in shares or bonds of the road, at his election, the amount, however, to be retained by the corporation as indemnity against a certain liability to which the road was subject. The corporation made and delivered to the director a certificate for the number of shares and endorsed thereon an agreement to exchange them for bonds at the election of the director and this certificate was then returned to the railroad as indemnity, and it was held there was an election to take the bonds notwithstanding the railroad had entered the shares on its records as property of the director.<sup>7</sup>

SEC. 830. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. SALE ON TRIAL OR APPROVAL. BAILMENT.—An option to a buyer to return the goods bought, if he is not satisfied, where no time to return is fixed, gives him a reasonable time, and the retention of the goods after a lapse of a reasonable time, must be regarded

<sup>5</sup> *Hamilton v. Finnegan*, 117 Iowa 623, 91 N. W. 1039.

<sup>6</sup> *Rose v. Monarch*, 150 Ky. 129, 150 S. W. 56.

<sup>7</sup> *Jones v. Portsworth & C. R. R. Co.*, 32 N. H. 544; see also *Litchfield v. Irvin*, 51 N. Y. 51.

as an acceptance of them.<sup>1</sup> Return of the property and notice must be within the time, and in accordance with the terms of the agreement, otherwise the option privilege of returning is lost.<sup>2</sup>

The following acts are held to amount to an acceptance: keeping the property or expressing satisfaction therewith; using a drilling machine after the expiration of the time limit for tests, notwithstanding the purchaser did not give the note and chattel mortgage as required;<sup>3</sup> retention and sale of goods on "trial order" after expiration of the time limit;<sup>4</sup> use of pump patterns, etc., after expiration of contract and demand for payment of royalty on their appraised value;<sup>5</sup> use of water filter under agreement to return if it proved unsatisfactory;<sup>6</sup> refusal to permit the goods to be removed or pay the price;<sup>7</sup> loaning the corn harvester to another person.<sup>8</sup> A mere notice that the machine is held subject to the order of the seller is not sufficient as an election to return.<sup>9</sup>

<sup>1</sup> *Ide v. Brody*, 156 Ill. App. 479.

<sup>2</sup> *Allyn v. Burns*, 37 Ind. App. 223, 76 N. E. 636, the rule of reasonable time not applying when the time is specified; *Watts v. National Cash Reg. Co.*, 25 Ky. L. Rep. 1347, 78 S. W. 118.

<sup>3</sup> *Star D. M. Co. v. McLeod*, 122 Ky. 564, 92 S. W. 558, 29 Ky. L. Rep. 84; also *Von Dohren v. John Deere Plow Co.*, 71 Neb. 276, 98 N. W. 830.

<sup>4</sup> *O'Donnell v. Wing & Son*, 121 Ga. 717, 49 S. E. 720.

<sup>5</sup> *Hooker Steam Pump Co. v. Buss*, 240 Mo. 465, 144 S. W. 419.

<sup>6</sup> *International Filter Co. v. Cox Bottling Co.*, 89 Kan. 645, 132 P. 180.

<sup>7</sup> *Frey-Sheckler Co. v. Iowa Brick Co.*, 104 Iowa 494, 73 N. W. 1051.

<sup>8</sup> *Hansen v. Beebe*, 111 Iowa 534, 82 N. W. 942.

<sup>9</sup> *Dickey v. Winston C. M. Co.*, 117 Ga. 131, 43 S. E. 493; *Malsby v. Young*, 104 Ga. 205, 30 S. E. 854.

As to contract of agency to sell, see *Owensboro Wagon Co. v. H. L. Riggins & Co.*, 151 N. C. 303, 66 S. E. 126.

In Massachusetts it is held that failure to return the bailed property within the stipulated time, is not an acceptance of the property, but merely evidence of that fact and that, consequently, where a horse was delivered to the bailee to be "tried" under an agreement to return the horse if the bailee "did not like it," and the horse escaped and was injured on the way to the house of the bailee, without his fault, and was, therefore, never "tried" by the bailee, the transaction was a bailment and the failure to return the horse was not an election to purchase.<sup>10</sup> So, where the bailee allows the time for trial to expire because of necessary repairs and changes to the gas producer or furnace; in such case, failure to return is not an election to purchase.<sup>11</sup>

It must not be taken for granted that the mere failure on the part of the bailee to act will, in every case, constitute an election to purchase. The form of the contract, or the circumstances concerning the transaction, may be such as not to make applicable the general rule. Thus, where pictures are left with the prospective purchaser on approval under an agreement by which they might be exchanged at any time for their face value, the purchaser was under no obligation to return the pictures at any particular time, and unless the option was exercised, no sale would ever take place, the transaction being a bailment with option to purchase.<sup>12</sup>

<sup>10</sup> *Hunt v. Wyman*, 100 Mass. 198; see *Gottlieb v. Rinaldo*, 78 Ark. 123, 93 S. W. 750, 6 L. R. A. (N. S.) 273.

<sup>11</sup> *Turner v. Muskegon M. & F. Co.*, 97 Mich. 166, 56 N. W. 356.

<sup>12</sup> *Steinhauer v. Henson*, 54 Colo. 246, 131 P. 255.

So, also, where an agreement gave the prospective purchaser a specified time to use it, and to return it at the expiration of the time, if dissatisfied. The purchaser has the full period for trial and a reasonable time thereafter in which to signify his election to accept or return, no time for election having been stipulated.<sup>13</sup>

Return delivery is completed upon delivery to the carrier which brought the goods to the prospective purchaser, the rule being that where no mode of transportation is agreed upon, the prospective purchaser may adopt the mode of transportation justified by the usages of trade.<sup>14</sup>

**SEC. 831. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. RENEWAL OR EXTENSION OF LEASE.**—The common forms of option in leases are to purchase the premises, to renew the lease for an additional term, or to extend the term of the original lease. The sufficiency of an election to purchase the premises under the first option is tested by the rules peculiar to that form of option.<sup>1</sup> We are concerned here with the privilege of renewal or extension. Under these covenants in

<sup>13</sup> *Springfield Engine Stop Co. v. Sharp*, 184 Mass. 266, 68 N. E. 224. And so where it is provided the purchaser can return the stock "after six months" if dissatisfied, *New Haven Trust Co. v. Gaffney*, 73 Conn. 480, 47 Atl. 760; see also *Jones v. Moncrief-Cook Co.*, 25 Okl. 856, 108 P. 403; *Von Dohren v. John Deere Plow Co.*, 71 Neb. 276, 98 N. W. 830; *Dickey v. Winston C. M. Co.*, 117 Ga. 131, 43 S. E. 493.

<sup>14</sup> *Gottlieb v. Rinaldo*, 78 Ark. 123, 93 S. W. 750, 6 L. R. A. (N. S.) 273. But leaving stock at bank and notifying vendor, is not sufficient, *Olsen v. Northern S. S. Co.*, 70 Wash. 493, 127 P. 112.

<sup>1</sup> See cases in note 4.

leases the troublesome question is as to what acts on the part of the lessee are a substitute, so to speak, for the formal, or, perhaps, the written notice expressly or impliedly required by the lease. Is a mere holding over by the lessee, after the expiration of the lease, sufficient, as an exercise of the option to renew or to extend?

The decisions are in conflict, but it would appear the conflict, speaking generally, arises more in the application of the law to particular facts, or in the construction of particular but varying clauses of leases, than to any great divergence of opinion among the courts as to the law.<sup>2</sup>

Some decisions make a distinction between the privilege of renewal of the lease and of the extension of the original term, holding that renewal contemplates a new lease for the additional term, whereas, an extension is a continuation of the term of the original lease which, by virtue of the extension, is continued in force.<sup>3</sup>

<sup>2</sup> *Whalen v. Manley*, 68 W. Va. 328, 69 S. E. 843; *Grant v. Collins*, 157 Ky. 36, 162 S. W. 539; *Kentucky L. Co. v. Newell*, 32 Ky. L. Rep. 396, 105 S. W. 972.

<sup>3</sup> *Whalen v. Manley*, 68 W. Va. 328, 69 S. E. 843; *Kollock v. Kaiser*, 98 Wis. 104, 73 N. W. 776; *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612; *Grant v. Collins*, 157 Ky. 36, 162 S. W. 539; *Shamp v. White*, 106 Cal. 220, 39 P. 537; *Howell v. City of Hamburg*, 165 Cal. 172, 131 P. 130.

In *Andrews v. Marshall Creamery Co.*, 118 Iowa 595, 92 N. W. 706, 60 L. R. A. 399, 96 A. S. R. 412, it is said that an extended term or additional term is one provided for in the lease itself, and the mere enjoyment of the privilege by remaining in possession is enough to bring the extended occupancy under the original lease; but an agreement for an option of renewal implies that the parties contemplate some affirmative act by way of creation of an additional term; that this affirmative act may be something different from and less than the execution of a new lease; for when the tenant has indicated affirmatively the election to avail himself of the privilege of renewal, he has done all that is necessary to make the renewal, for the condi-

The consequence of this distinction, theoretically at least, is that under the former, if the lessee desires to renew and thus turn his privilege into a new lease, he must exercise his option in conformity with the rules peculiar to options to purchase, and that, therefore, a mere holding over after the expiration of the lease is not sufficient as the exercise of the option privilege.<sup>4</sup>

On the other hand, since an extension is a continuation of the term of the original lease, which continues in force by virtue of the extension, a mere holding over, according to some decisions,<sup>5</sup> is sufficient as the exercise of this privilege, and, consequently, a holding over by the lessee continues the original lease for the additional term. Other

tions under which the new term is to be enjoyed will be the same as those under which the first term is enjoyed save as to the condition which provides for a renewal.

<sup>3</sup> Case where formal execution of a new lease was required by the provisions of the old one and the "arrangements" for which were held to fall upon the lessee, and, consequently, a mere notice of renewal was held not sufficient, *Christian Feigenspan v. Popowska*, 75 N. J. Eq. 342, 72 Atl. 1003.

<sup>4</sup> *Renoud v. Daskam*, 34 Conn. 512; *Thiebaud v. First Nat'l Bank*, 42 Ind. 212; *Bullock v. Grinstead*, 95 Ky. 261, 24 S. W. 867.

*Swank v. St. Paul City Ry. Co.*, 61 Minn. 423, 63 N. W. 1088, holding over under covenant of renewal, tenant is not liable until he elects to renew, not remaining in possession.

*Leavitt v. Maykell*, 203 Mass. 506, 89 N. E. 1056, holding the word "renewal" imports giving new lease and saying that "it was necessary that there should be either the making of a new lease for the additional term or a formal extension of the existing lease, or something equivalent thereto, in order to bind the parties for a period of two years more."

Refusal to deliver up possession on demand of lessor is election to renew, *Ewing v. Miles*, 12 Tex. Civ. App. 19, 33 S. W. 235.

<sup>5</sup> *Andrews v. Marshall Creamery Co.*, *supra*; see cases cited in note 1 to section 834.

decisions take the view that a mere holding over after the expiration of the lease is presumed to be a tenancy from year to year, or from month to month, or other statutory tenancy, and that unless accompanied by some act referable to the privilege of extension and showing an intention on the part of the lessee to hold under the extension, a holding over is neither a renewal nor an extension.<sup>6</sup>

SEC. 832. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. RULE WHERE LESSEE HOLDS OVER AND PAYS HIGHER OR DIFFERENT RENTAL.—It is said by the Supreme Court of Minnesota that all of the decisions are in accord, that where the lease provides for a higher rental for the additional term, or for a renewal, and there is a holding over by the lessee with payment and acceptance of higher rental,

<sup>6</sup> *Andrews v. Marshall Creamery Co.*, *supra*; *English v. Murtland*, 214 Pa. 325, 63 Atl. 882, 112 A. S. R. 747, 6 Ann. Cas. 339; *Whalen v. Manley*, 68 W. Va. 328, 69 S. E. 843; *Spangler v. Rogers*, 123 Iowa 724, 99 N. W. 580.

In Massachusetts it is held that holding over is merely evidence of an intention to occupy the premises under the extension which may be overcome by evidence of a contrary intention, *Atlantic Nat'l Bank v. Denmon*, 139 Mass. 420, 1 N. E. 833.

A covenant to renew "at the will and pleasure" of the lessor at such time as the lessor shall determine, gives renewal only on terms and for time fixed by lessor, *Thomas Hinds Lodge v. Church*, 103 Miss. 130, 60 So. 66.

The decisions under consideration in the text are those involving express covenants to renew or to extend. As to tenancy arising under leases having no such express covenants and also as to the rights of the parties, see *Kennedy v. City of New York*, 196 N. Y. 19, 89 N. E. 360.

these acts establish an exercise of the option and a waiver of formal notice.<sup>1</sup>

A lease provided that the lessee should have the privilege of renewal, for a further term of two years, from the expiration of the lease, at an increased rental, provided three months' notice was given. The notice was given and the increased rental paid, but no new lease was executed. The lessor brought summary proceeding to recover possession of the premises. It was held there was a sufficient election, and that the lessee could set up the equitable defense in such proceedings.<sup>2</sup>

A lease until a specified time, at a fixed rental, with a higher rental after that time as long as the lessee "may want" the premises, gives a right of renewal, and the lessee, by continuing in possession after the expiration of the original term and pay-

<sup>1</sup> Kean v. Story & Clark Piano Co., 121 Minn. 198, 140 N. W. 1031, citing Kramer v. Cook, 7 Gray (Mass.) 550; Long v. Stafford, 103 N. Y. 274, 8 N. E. 522; Stone v. St. Louis Stamping Co., 155 Mass. 267, 29 N. E. 623. In the New York case, *supra*, the lease required a written notice "for a continuance for two years longer." The Court held the continued occupancy of the store and payment and receipt of the increased rent were an election to take the store for the new term. In the Stone case, *supra*, the facts were substantially the same. The Court held the provision for written notice for the extended term, being for the benefit of the lessor, could be waived by him. In the Kramer case the Court said the continuation by the lessees, in the occupancy of the premises and paying the increased rent stipulated for in case of continuance, were the best evidence of the election of the lessees to avail themselves of the further term.

See Carhart v. White M. & T. Co., 122 Tenn. 455, 123 S. W. 747, 19 Ann. Cas. 396, where tenant held over under covenant to pay increased rent, but paid the old rental and this was held not to be a renewal.

<sup>2</sup> Ferguson v. Jackson, 180 Mass. 557, 62 N. E. 965.



ing the increased rental, sufficiently elects to avail himself of the option to renew.<sup>3</sup>

SEC. 833. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. RULE WHERE SAME RENTAL IS PAID. RENEWALS.—The decisions on the subject matter of this section are in conflict. One line holds that the act of holding over is not sufficient to establish an affirmative election to renew the lease for an additional term under a stipulation giving the privilege of such renewal. This is based on the theory, supported by the weight of authority, that a covenant of renewal implies the creation of a new term, and that some exercise of the right of election to assume the obligations involved thereunder should affirmatively appear,<sup>1</sup> and distinguishes a covenant for renewal from a privilege of extension under which latter, any act, such as a mere holding over, shows an election to treat the original lease as continued for the extended or additional term.

Another line of decisions apparently makes no distinction between covenants for renewal and for

<sup>3</sup> *Kelleher v. Fong*, 108 Me. 181, 79 Atl. 466.

Where the rent under the renewal is to be agreed on by the parties, the lease is not renewed where there is no agreement, *Hablich v. University Park Bldg. Co.*, 117 Ind. 193, 97 N. E. 539.

<sup>1</sup> *Leavitt v. Maykell*, 203 Mass. 506, 89 N. E. 1056, distinguishing earlier cases which were construed as not requiring a new lease; *Andrews v. Marshall Creamery Co.*, 118 Iowa 595, 92 N. W. 706, 60 L. R. A. 399, 96 A. S. R. 412; *Whalen v. Manley*, 68 W. Va. 328, 69 S. E. 843; see *Thiebaud v. Bank*, 42 Ind. 212; *Terstegge v. Society*, 92 Ind. 82, 47 Am. Rep. 135; *Renoud v. Daskam*, 34 Conn. 512; *Kollock v. Kaiser*, 98 Wis. 104, 73 N. W. 776; *Carhart v. White M. & T. Co.*, 122 Tenn. 455, 123 S. W. 747, 19 Ann. Cas. 396; *Chittenden v. W. U. T. Co.*, 154 Mich. 1, 117 N. W. 548.

extensions and rules that holding over amounts to a renewal of the lease for the stipulated period.<sup>2</sup>

SEC. 834. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. RULE WHERE SAME RENTAL IS PAID. EXTENSIONS.—Where the covenant is one for an extension of the term of the original lease and does not provide for notice of election, the courts are in substantial agreement that payment and receipt of the same rental works an extension of the original lease.<sup>1</sup>

The difficulty here, however, as also with reference to renewals, is not so much in the rule of law concerning which the courts substantially agree, as in the construction of particular clauses providing for an extended or additional term. The rule seems to be that it is the duty of the court to discover

<sup>2</sup> *Holton v. Andrews*, 151 N. C. 340, 66 S. E. 212; *McBrier v. Marshall*, 126 Pa. 390, 17 Atl. 647; *Insurance & L. Bldg. Co. v. Nat'l Bank*, 71 Mo. 58; *Ranlet v. Cook*, 44 N. H. 512, 84 Am. Dec. 92; *Clarke v. Merrill*, 51 N. H. 415; see *Kentucky Lumber Co. v. Newell*, 32 Ky. L. Rep. 396, 105 S. W. 972; *Ewing v. Miles*, 12 Tex. Civ. App. 19, 33 S. W. 235; *Schroeder v. Gemeinder*, 10 Nev. 355.

<sup>1</sup> *Andrews v. Marshall etc. Co.*, 118 Iowa 595, 92 N. W. 706, 60 L. R. A. 399, 96 A. S. R. 412; *Carhart v. White M. & T. Co.*, 122 Tenn. 455, 123 S. W. 747, 19 Ann. Cas. 396; *Mershon v. Williams*, 62 N. J. L. 779, 42 Atl. 778; *Harding v. Seeley*, 148 Pa. 20, 23 Atl. 1118; *Callahan Co. v. Michael*, 45 Ind. App. 215, 90 N. E. 642; *Terstegge v. Society*, 92 Ind. 82, 47 Am. Rep. 135; *Peehl v. Bambalek*, 99 Wis. 62, 74 N. W. 545, "two years with privilege of three more"; *Stone v. Stamping Co.*, 155 Mass. 267, 29 N. E. 623; *Kramer v. Cook*, 7 Gray (Mass.) 550; *Clarke v. Merrill*, 51 N. H. 415; *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392; *Quinn v. Valiquette*, 80 Vt. 434, 68 Atl. 515; *Insurance etc. Co. v. National Bank*, 71 Mo. 58; *Holley v. Young*, 66 Me. 520; *Montgomery v. Hamilton Co. Board*, 76 Ind. 362, 40 Am. Rep. 250; *Hamby & Toomer v. Georgia I. & C. Co.*, 127 Ga. 792, 56 S. E. 1033; *Falley v. Giles*, 29 Ind. 114; *Lowry Realty Co. v. Wiles*, 123 Minn. 297, 143 N. W. 738.

the intention of the parties.<sup>2</sup> This rule, like the other rule just mentioned, is well established, but its application, as exhibited by the decisions, shows much difference of opinion even as applied to clauses whose language is substantially the same. The consequence is that a clause expressly providing for a “renewal” is sometimes construed to be an extension, and *vice versa*.<sup>3</sup>

And this fact suggests that entirely too much importance is attached to the alleged distinction between renewals and extensions. An election to renew differs from an election to extend only as the facts and circumstances differ. If, in either case, the lease requires written notice, such notice must be given unless it is waived by the lessor, and if it is waived, the sufficiency of the act done as an election cannot be determined by ascertaining, through construction, whether the covenant is one to renew or one to extend, but only by determining, under all the facts and circumstances of the particular case, whether the act is such as to furnish notice to the lessor of the intention of the lessee to exercise his option privilege to renew the

<sup>2</sup> Grant v. Collins, 157 Ky. 36, 162 S. W. 539; Kentucky L. Co. v. Newell, 32 Ky. L. Rep. 396, 105 S. W. 972.

<sup>3</sup> Orton v. Noonan, 27 Wis. 272, holds a covenant to “extend the lease” contemplates a new lease.

Kentucky L. Co. v. Newell, 32 Ky. L. Rep. 396, 105 S. W. 972, construing the word “renewal” as meaning an extension.

Hall v. Spaulding, 42 N. H. 259, right to a “lease” construed as an extension; see, also, Briggs v. Chase, 105 Me. 317, 74 Atl. 796; Hamby & Toomer v. Georgia I. & C. Co., 127 Ga. 792, 56 S. E. 1033; Shamp v. White, 106 Cal. 220, 39 P. 537; Beller v. Robinson, 50 Mich. 264, 15 N. W. 448; Howell v. City of Hamburg Co., 165 Cal. 172, 131 P. 130; Flynn v. Bachner, 168 Mich. 424, 134 N. W. 451, Ann. Cas. 1913C, 641.

lease or to extend its term.<sup>4</sup> The fact that a renewal contemplates a new lease while an extension does not, is a circumstance to be considered, but it is not the deciding factor, as the execution of the new lease is to follow the election and is not, therefore, the election or performance, unless, of course, the duty to prepare and tender the lease is on the lessee.

**SEC. 835. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. RULE WHERE WRITTEN OR FORMAL NOTICE IS PROVIDED FOR OR IMPLIED OR THE MODE OF COMMUNICATION IS PRESCRIBED.**—It is an established rule that the provisions of the contract control with reference to the kind of notice and the mode of its communication. And when, therefore, a lease provides for written notice, or implies formal notice, and specifies the mode of its communication, a departure from the requirements of the provisions of the lease in any of these respects is fatal unless helped out by the rule of waiver, or estoppel, as pointed out below. Thus, where a lease requires a written notice, a mere holding over after the expiration of the lease does not show an elec-

<sup>4</sup> Holding over accompanied by some act showing that the lessee is continuing in possession under the privilege of extension or renewal and not as a mere tenant holding over after the expiration of the time, is generally held sufficient to renew or to extend, where written or formal notice is not specified. See *Kimball v. Cross*, 136 Mass. 300, renting building; *Hurley-Tobin Co. v. White*, (N. J.) 94 Atl. 52.

In the absence of an express provision that a new lease was intended, the presumption is that no new lease is to be executed, but that the lessee is to continue to hold under the original lease, *Callahan Co. v. Michael*, 45 Ind. App. 215, 90 N. E. 642.

tion to renew;<sup>1</sup> and so, where notice is required a certain time before the expiration of the term.<sup>2</sup> But in the absence of an intention of the parties appearing from the instrument to require written notice, verbal notice is sufficient.<sup>3</sup>

The general rule above stated, however, is controlled by the facts and circumstances. Accordingly, where the lessee holds over and pays a higher rental which is received by the lessor, the written notice is thereby waived.<sup>4</sup> And so where he holds over and pays the same rent.<sup>5</sup> So where the lessor consents to the extension, upon verbal notice from the lessee, before the expiration of the time fixed in the lease for giving the notice.<sup>6</sup> So,

<sup>1</sup> *Cooper v. Joy*, 105 Mich. 374, 63 N. W. 414; *Tilleney v. Knoblauch*, 73 Minn. 108, 75 N. W. 1039, extension implies verbal notice; *Callahan Co. v. Michael*, 45 Ind. App. 215, 90 N. E. 642; *Beller v. Robinson*, 50 Mich. 264, 15 N. W. 448; *Chamberlain v. Dunlop*, 126 N. Y. 45, 26 N. E. 966; *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25, 84 S. W. 216; *Jackson Brewing Co. v. Wagner*, 117 La. 875, 42 So. 356.

<sup>2</sup> *English v. Murtland*, 214 Pa. 325, 63 Atl. 882, 112 A. S. R. 747, 6 Ann. Cas. 339; *Beller v. Robinson*, *supra*, involving Statute of Frauds.

<sup>3</sup> *Darling v. Hoban*, 53 Mich. 599, 19 N. W. 545; *Briggs v. Chase*, 105 Me. 317, 74 Atl. 796.

<sup>4</sup> *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522; *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E. 623.

For jury to determine if waiver on facts, *McClelland v. Rush*, 150 Pa. 57, 24 Atl. 354.

<sup>5</sup> *Probst v. Rochester S. L. Co.*, 171 N. Y. 584, 64 N. E. 504, by remaining in possession and paying rent the lessee impliedly exercised his option and the lessor by receiving the rent impliedly waived written notice; *Remm v. Landon*, 43 Ind. App. 91, 86 N. E. 973; see *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E. 623; *Holton v. Andrews*, 151 N. C. 340, 66 S. E. 212; *Kean v. Story & Clark Piano Co.*, 121 Minn. 198, 140 N. W. 1031; *In re Allen's Estate*, 117 Minn. 333, 135 N. W. 812, renewal by sub-tenant; *Dockery v. Thorne*, (Tex. Civ. App.) 135 S. W. 593.

<sup>6</sup> *McClelland v. Rush*, 150 Pa. 57, 24 Atl. 354.

where the lessee, under a lease requiring notice to continue to be served 90 days before the expiration of the lease, gives notice 58 days before the expiration and continues in the occupation of the premises, without objection, after the expiration of the lease.<sup>7</sup> So, under a renewal clause providing for appointment of appraisers to fix the new rental, the joining in the appointment of appraisers by the lessor two days after the expiration of the lease, waives the right to notice from the lessee of his exercise of the renewal privilege.<sup>8</sup>

The giving of written notice as provided in the lease constitutes in itself a renewal.<sup>9</sup>

**SEC. 836. PARTICULAR ACT AS ELECTION OR ACCEPTANCE. FAILURE OF LESSEE TO GIVE NOTICE TO TERMINATE THE LEASE. ALSO LESSOR'S OPTION.**—Leases sometimes provide that they shall continue in force for a fixed period after the expiration of the term originally provided for, in the event the lessee does not give notice of his intention to terminate, prior to the expiration of the term. In such cases failure to give the notice to terminate required by the provisions of the lease works a continuance of the lease.<sup>1</sup>

Where the lease gives the lessor the option to extend or renew, the permission given by the lessor

<sup>7</sup> Sheppard v. Rosekrans, 109 Wis. 58, 85 N. W. 199, 83 A. S. R. 886.

<sup>8</sup> Marino v. Williams, 30 Nev. 360, 96 P. 1073; see Wilson v. Herbert, 76 Md. 489, 25 Atl. 685.

<sup>9</sup> Chittenden v. W. U. T. Co., 154 Mich. 1, 117 N. W. 548; Bettens v. Hoover, 12 Cal. App. 313, 107 P. 329.

<sup>1</sup> Dix v. Atkins, 130 Mass. 171; see Chretien v. Doney, 1 N. Y. 419.

to the lessee to hold over is an exercise of the lessor's option to extend the lease.<sup>2</sup>

So, where the lessor has an option to purchase the tenant's improvements, or to grant a renewal, and the lessor fails to exercise either option, and the tenant holds over;<sup>3</sup> such failure is also an election by the optionor to pay for the improvements.<sup>4</sup>

SEC. 837. ELECTION VARYING TERMS OF OFFER OR OPTION. GENERALLY.—The rule is that to raise a binding contract, the offer must be accepted in accordance with the terms and conditions made by it. If the acceptance or election goes beyond or falls short of the terms proposed, no contract results.<sup>1</sup> Within this rule fall the time, the place, and the mode of acceptance. Out of it grows the further rule that the acceptance, or election, must be absolute and unconditional.

<sup>2</sup> *Lowry Realty Co. v. Wiles*, 123 Minn. 297, 143 N. W. 738; also *Trainor v. Schutz*, 98 Minn. 213, 107 N. W. 812.

<sup>3</sup> *Feldmeyer v. Werntz*, 119 Md. 285, 86 Atl. 986.

<sup>4</sup> *Bullock v. Grinstead*, 95 Ky. 261, 24 S. W. 867.

<sup>1</sup> *Henry v. Black*, 213 Pa. 620, 63 Atl. 250; *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; *Sawyer v. Brossart*, 67 Iowa 678, 25 N. W. 876, 56 Am. Rep. 371; *Atwood v. Rose*, 32 Okl. 355, 122 P. 929; *Triplett v. Gudebrod*, 115 Va. 669, 79 S. E. 1045; *Joy v. Birch*, 4 Cl. & Fin. 57, 7 Eng. Reprint 22; *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830; *Clark v. East Lake Lumber Co.*, 158 N. C. 139, 73 S. E. 793.

*Monahan v. Allen*, 47 Mont. 75, 130 P. 768, where the offer and acceptance left the character of security open for future determination.

There can not be an acceptance in part, *Rehm-Zeiher Co. v. F. G. Walker Co.*, 156 Ky. 6, 160 S. W. 777, or for a renewal of a lease for one year under a clause for renewal for a four-year term, *Mer-shon v. Williams*, 62 N. J. L. 779, 42 Atl. 778; see Sec. 822

The mode and place of acceptance, or election, have already been presented.<sup>2</sup> The time of acceptance will be considered later on.<sup>3</sup> It is proposed to present in the next following sections the rule that the acceptance, or election, must be absolute and unconditional, in accordance with the terms of the offer or option. To do this, clearly it seems necessary to point out the distinction between a mere offer and a pure option as well as the distinction between an election under, and the performance of, an option contract.

**SEC. 838. EFFECT OF CONDITIONAL ACCEPTANCE OR ELECTION. DISTINCTION BETWEEN ACCEPTANCE OF OFFER AND ELECTION UNDER OPTION.**—It is laid down in the law of offers that a qualified or conditional acceptance is a rejection of the offer.<sup>1</sup> It is clearly established by the decisions that a qualified or conditional acceptance of an offer does not raise a contract because the minds of the parties do not meet in agreement upon the same terms.<sup>2</sup> It is said

<sup>2</sup> See Secs. 816-822.

<sup>3</sup> See Secs. 848 *et seq.*

<sup>1</sup> *Minn. etc. Ry. Co. v. Columbus etc. Co.*, 119 U. S. 149, 30 L. Ed. 376, 7 Sup. Ct. 168; *Henry v. Black*, 213 Pa. 620, 63 Atl. 250; *Russell v. Falls Mfg. Co.*, 106 Wis. 329, 82 N. W. 134; *Tilton v. Sterling C. & C. Co.*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689; *Elmer v. Hart*, 121 La. 537, 46 So. 619; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Lewis v. Johnson*, 123 Minn. 409, 143 N. W. 1127; *Jones v. Monerief-Cook Co.*, 25 Okl. 856, 108 P. 403.

<sup>2</sup> *Atkins v. Kattman*, 50 Ind. App. 233, 97 N. E. 174; *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687; *Couch v. McCoy*, 138 Fed. 696; *Reich v. Dyer*, 86 N. Y. S. 544, 91 App. Div. 240; *Clark v. East Lake L. Co.*, 158 N. C. 139, 73 S. E. 793; *Clark v. Burr*, 85 Wis. 649, 55 N. W. 401, 403.



that such an acceptance is a counter-proposal for a new contract, to give legal life to which requires the assent or acceptance of the other party.<sup>3</sup> It is in this sense that a qualified or conditional acceptance is a rejection of the offer first made because the original negotiations are dropped and negotiations for a new and different contract begun.

An option is a contract, the negotiations for the making of which are concluded by the execution and delivery of the option. The minds of the parties have met in agreement, the distinctive feature of which is that the optionor, for a consideration, binds himself to keep the option open for election by the optionee, for and during the time stipulated, or implied by law.

<sup>3</sup> Linn v. McLean, 80 Ala. 360; Breen v. Mayne, 141 Iowa 399, 118 N. W. 441; Pearson v. Millard, 150 N. C. 303, 63 S. E. 1053; Tilton v. Sterling C. & C. Co., 28 Utah 173, 77 P. 758, 107 A. S. R. 689; Bowen v. McCarthy, 85 Mich. 26, 48 N. W. 155; Four Oil Co. v. United Oil Producers, 145 Cal. 623, 79 P. 366, 68 L. R. A. 226, offer to sell oil; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Washington v. Rosario Min. Co., 28 Tex. Civ. App. 430, 67 S. W. 459; Coreoran v. White, 117 Ill. 118, 7 N. E. 525, 57 Am. Rep. 858; Larned v. Wentworth, 114 Ga. 208, 39 S. E. 855; James v. Darby, 100 Fed. 224, 40 C. C. A. 341; Atwood v. Rose, 32 Okl. 355, 122 P. 929; Elmer v. Hart, 121 La. 537, 46 So. 619; King v. Maxey, (Tex. Civ. App.) 28 S. W. 401; Stitt v. Huidekopers, 17 Wall. 384, 21 L. Ed. 644; Wetherby v. Griswold, (Ore.) 147 P. 388.

Millard v. Martin, 28 R. I. 494, 68 Atl. 420, rule applied in favor of grantee of lessor where lease granted option to purchase, the election of the lessee-optionee being conditional or rather a new offer.

If the optionor assents to the proposed change of terms, the contract of sale is completed, Linn v. McLean, *supra*; Brooks v. Miller, 103 Ga. 712, 30 S. E. 630, but the transaction is considered in law as a new proposal and acceptance. See cases in note 1, *supra*.

Agent of optionor has no authority to consent to a conditional acceptance, Larned v. Wentworth, 114 Ga. 208, 39 S. E. 855.

Rule of text applies to option to return, Alexander v. Bosworth, (Cal. App.) 147 P. 607.

Under an option, the act necessary to raise a binding promise to sell, is not, therefore, an acceptance of the offer, but rather the performance of the condition of the option contract. If this is true, then the rule peculiar to offers to the effect that a conditional acceptance is, in itself, in every case, a rejection of the offer, is not applicable to an option contract, supported by a consideration and fixing a time limit for election.

The optionee has a fixed time to elect. The right to elect continues for the full period unless, prior to its expiration, he surrenders or breaches the option. Is a conditional election a surrender of the option right? The answer depends upon the facts. Suppose the optionee in a notice of election given on the last day of the time limit, through inadvertence, makes it a condition that the deed of conveyance shall be delivered at a certain bank where he notices he has deposited the price, or demands the furnishing of a certificate of title to the property, neither of which is authorized by the terms of the option, but the optionee discovering his mistake, immediately thereafter, on the same day, gives a new and second notice squarely meeting the terms of the option. Has the optionee lost his rights? Is his conditional election a rejection of the option privilege? Certainly not, in the absence of a showing that in making the conditional election it was the intention of the optionee not to accept upon the terms of the option. It seems to us that, so far as an option contract is concerned, a conditional election is a rejection in those cases only where the facts show an intention to abandon the option rights. A conditional election purposely made

undoubtedly furnishes strong and usually conclusive evidence of such intention.<sup>4</sup>

SEC. 839. ELECTION AND PERFORMANCE DISTINGUISHED.—Election, as we have seen, is the act which converts the option into a binding promise on the part of the optionor to sell. In a very broad sense it is an act of performance, but a performance which is optional with the optionee. The performance we now have in mind is one which grows out of the election and thus becomes obligatory upon the optionee. As thus viewed the distinction between election and performance is apparent, since the former has to do with the creation of the

<sup>4</sup> It will be found, we think, upon examination of the cases that the counter-offers, etc., held to be rejections showed an intention to yield up the option privilege, if the counter-proposition was not accepted, see *Jones v. Monerief-Cook Co.*, 25 Okl. 856, 108 P. 403; also *Foster v. City of Boston*, 39 Mass. 33.

See *James v. Darby*, 100 Fed. 224, 40 C. C. A. 341, to the point that such election manifests an intention to make a new contract and to abandon the old one.

*Harper v. Runner*, 85 Neb. 343, 123 N. W. 313, holding, in effect, that a counter-proposition did not destroy the option privilege.

*McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25, holding that a conditional election is not a rejection of the option privilege in the sense of ending the optionee's rights thereunder, when a subsequent proper and timely election is made; the Court referring to the rule, said it applied only to offers and not to an option supported by a consideration. See, also, *Royal Brewing Co. v. St. Louis Brewing Co.*, (Mo. App.) 176 S. W. 553.

See *Ward v. Wolverhampton Water Works*, L. R. 13 Eq. 234, 41 L. J. Ch. 308, 25 L. T. Rep. (N. S.) 487, 20 Wkly. Rep. 85, holding that giving a first notice not followed up did not prevent the optionee giving a second notice.

But this rule would not apply when the original option has been superseded by another fixing a different time, *Cleaves v. Walsh*, 125 Mich. 638, 84 N. W. 1108.

contract and the latter with the fulfillment of the terms of that contract after its creation.

The distinction just noted is an important one in the law of options. Owing to the one-sided nature of the option contract, the law is insistent that the election, that is, the act which raises the option to a contract, shall be strictly in accordance with the terms of the option. Whereas, performance of the contract thus raised is governed by rules applicable to contracts generally and the consequence is that the rules of waiver, forfeiture and such like which play so important a part in the law of what may be called technical breach, is rather reluctantly applied, if applied at all, in many instances, to help out an election which fails in any substantial particular to meet the requirements of the option.

The option itself is the test of the sufficiency of the election, but it is sometimes difficult to determine from the language used just what acts constitute the election. It is competent, for instance, to provide that in addition to communication of the bare fact that the optionee elects to purchase, that the whole or a part of the price for the property shall then be paid, or that some other act shall be done as a part of the act of election or as a condition precedent to the exercise of the option privilege. Clearly in such cases a mere notice of election is fatally short of the option requirements.<sup>1</sup> On the other hand, if the option provides for notice merely

<sup>1</sup> Pollock v. Brookover, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; Killough v. Lee, 2 Tex. Civ. App. 260, 21 S. W. 970.

As to conditions precedent to the exercise of the option privilege, like paying rent, etc., see Sec. 715 *et seq.*

and contemplates that the price shall be paid or the other acts performed after the act of election, then such acts are not part of election but have to do with the performance of the contract solely and only.<sup>2</sup>

The distinction we are endeavoring to bring out is that in the latter class of cases, election is an act entirely separate and apart from the paying or the securing of the price, and that payment and securing of the price are merely matters of performance of the contract raised by the election, the sufficiency and timeliness of which are tested by the rules of law relating to the performance of contracts generally and not by the rules of law peculiar to the acceptance of offers.<sup>3</sup>

**SEC. 840. ELECTION VARYING TERMS OF OPTION. CASES.**—An offer by letter of a bargain, by one person to another, imposes no obligation upon the former, unless it is accepted by the latter according to the terms in which the offer was made.<sup>1</sup> The optionee can not insist upon anything more than compliance with the original proposal.<sup>2</sup>

<sup>2</sup> See *Turner v. McCormick*, 56 W. Va. 161, 49 S. E. 28, 107 A. S. R. 904, 67 L. R. A. 853; *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687; *Brown v. Slee*, 103 U. S. 828, 26 L. Ed. 618; *Penn. Min. Co. v. Smith*, 207 Pa. 210, 56 Atl. 426; *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171; *Binford v. Steele*, 161 N. C. 660, 77 S. E. 954.

<sup>3</sup> *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; *Brown v. Slee*, and cases *supra*.

<sup>1</sup> *Eliason v. Henshaw*, 4 Wheat. (U. S.) 228; see *Bowen v. McCarthy*, 85 Mich. 26, 48 N. W. 155.

<sup>2</sup> *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37, this case involved an option by one partner to purchase the interest of the other, the tender not allowing for debts paid off after the date of the option.

To constitute a binding contract made by correspondence there must be a proposal squarely and unqualifiedly assented to.<sup>3</sup>

Where the owner of a piece of property offers to sell it for a specified amount of money and the offeree telegraphs, "Accept your offer for two buildings at \$5000. Money at your order at First National Bank here. Telegraph me immediately when to expect deed," the acceptance is not one contemplated by the offer, and, therefore, creates no rights in the latter to claim specific performance.<sup>4</sup>

An election by an assignee of the optionee tendering his own notes for the deferred payments is not in accordance with the terms of the option and is, therefore, insufficient.<sup>5</sup>

An option provided that \$25,000 of the price should be paid in cash and the balance by note, secured by purchase money mortgage, for a specified time and interest. An election tendering \$5000 cash and a common bond and mortgage "to be limited to the premises," thus avoiding personal liability on the bond, is insufficient.<sup>6</sup>

<sup>3</sup> *Wristen v. Bowles*, 82 Cal. 84, 22 P. 1136.

Inquiry if optionor will accept modified terms is not a conditional election, nor a rejection, *Stevenson v. McLean*, 5 Q. B. D. 346.

<sup>4</sup> *Sawyer v. Brossart*, 67 Iowa 678, 25 N. W. 876, 56 Am. Rep. 371, the optionor resided at Los Angeles, Cal.; the property was situated at Iowa City, Iowa; clearly the money was payable at Los Angeles; the telegram was sent from Iowa City.

<sup>5</sup> *Rice v. Gibbs*, 40 Neb. 264, 58 N. W. 724.

<sup>6</sup> *Henry v. Black*, 213 Pa. 620, 63 Atl. 250.

SEC. 841. CONDITIONAL ELECTIONS. CASES.—Courts have justly and properly shown a discriminating liberality in favor of the optionee where, in a particular case, equity seemed to require it, in determining what are and what are not conditional elections.<sup>1</sup> But there is a point beyond which there is no room for the application of any but legal principles. Where, in the notice of election, it is expressly made a condition precedent to the election itself that the optionor shall do some unauthorized act or forego some authorized right the election is ineffectual for any purpose. Thus, where the notice of election, accepting an offer to sell oil, made it a condition precedent that the oil must be at a fixed temperature, and the offer itself was silent on this point, it is a qualified and conditional acceptance and, therefore, amounts to a rejection of the offer.<sup>2</sup>

Where the offer is to sell land for cash, a notice of election “providing the title is perfect,” without tender or payment of the cash, does not make a contract.<sup>3</sup>

An election, “if details are satisfactorily arranged” and if an abstract of title is furnished which the attorneys of the optionee shall pronounce

<sup>1</sup> *Bonnewell v. Jenkins*, L. R. 8 Ch. Div. 70, the intention to add an unauthorized condition must be clearly expressed and made to optionor; strict construction is the rule; *Gibbins v. Asylum Dist.*, 11 Beav. 1, 17 L. J. Ch. 5, 50 Eng. Reprint 716.

<sup>2</sup> *Four Oil Co. v. United Oil Producers*, 145 Cal. 623, 79 P. 366, 68 L. R. A. 226, this was a mere offer of sale and not an option.

<sup>3</sup> *Corcoran v. White*, 117 Ill. 118, 7 N. E. 525, 57 Am. Rep. 858, this also was a mere offer.

*Friendly v. Elwert*, 57 Ore. 599, 105 P. 404, 112 P. 1085, Ann. Cas. 1913A, 357, requiring title cleared up; there was no consideration; see *Larned v. Wentworth*, 114 Ga. 208, 39 S. E. 855.

perfect, when the option contains no such requirements, is not an "acceptance" of the option.<sup>4</sup>

Where the option provides for the sale of a certain number of acres of land "more or less," a notice of election by the optionee to purchase the exact number of acres named "provided a clear and undisputed title can be made" for the whole tract, is insufficient to give the optionee any rights.<sup>5</sup> The optioned property having burned, an election by the optionee on condition that the insurance money should be applied on the price, was held conditional and unauthorized.<sup>6</sup>

A notice of election which fixes a different place for the delivery of the deed and payment of the purchase money from that implied by the terms of the option, is not an unconditional "acceptance" so as to bind the optionor.<sup>7</sup>

An election which fixes a time for the payment of the cash installment required by the option, or which requires the optionor to furnish an abstract of title, not called for by the option, is conditional.<sup>8</sup>

<sup>4</sup> *James v. Darby*, 100 Fed. 224, 40 C. C. A. 341. In this case the optionee expressly imposed unauthorized conditions as a condition precedent to acceptance.

As to waiver, see *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830.

<sup>5</sup> *Clark v. East Lake L. Co.*, 158 N. C. 139, 73 S. E. 793.

<sup>6</sup> *Clark v. Burr*, 85 Wis. 649, 55 N. W. 401.

<sup>7</sup> *Langellier v. Schaefer*, 36 Minn. 361, 31 N. W. 690; this was a mere offer and by its express terms the price was payable in *cash*; see *Beiseker v. Amberson*, 17 N. D. 215, 116 N. W. 94, distinguished in *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150; also *Bowen v. McCarthy*, 85 Mich. 26, 48 N. W. 155; *Clark v. East Lake L. Co.*, *supra*; *Curtis v. Sexton*, 142 Mo. App. 179, 125 S. W. 806, repurchase.

<sup>8</sup> *Knox v. McMurray*, 159 Iowa 171, 140 N. W. 652.



SEC. 842. SAME. CONTINUED.—An option contract required the purchaser, on his electing to purchase, to pay one-half of the price in cash and secure the balance. In making his election he prepared and tendered a deed to the optionors for their execution and which as prepared also required the execution by parties other than the optionors (heirs and devisees), the latter of whom were not named in the option, or as the court said “nominated in the bond.” It further appeared that the optionee failed to tender the cash part of the price, or the security for the balance, within the option time. It was held the election was conditional because of the demand for the execution of a deed by the heirs and devisees, and further, that by the terms of the option, payment of the cash part of the price and the securing of the balance, were a part of the act of election, and, therefore, necessary to bring into existence a binding contract of sale and purchase.<sup>1</sup>

A written notice of election accepting an option “subject to a good title guaranteed by” a certain title company is conditional where no such requirement is contained in the option.<sup>2</sup> An election and tender coupled with a demand for a receipt for a larger sum than has been paid, is insufficient.<sup>3</sup> An “acceptance” of an offer to purchase, accompanied

<sup>1</sup> *Trodden v. Williams*, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867.

<sup>2</sup> *Elmer v. Hart*, 121 La. 537, 46 So. 619.

So, where the election is on condition that the title is perfect, *Washington v. Rosario M. Co.*, 28 Tex. Civ. App. 430, 67 S. W. 459.

<sup>3</sup> *Rude v. Levy*, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 91, 127 A. S. R. 123.

by a check in part payment, the balance "to be paid in 90 days, if titles are clear," is conditional.<sup>4</sup>

SEC. 843. UNCONDITIONAL ELECTION. **TURNER v. McCORMICK.**—It is necessary to keep in mind the distinction heretofore pointed out between those acts necessary to raise the option contract to an agreement of sale, and those acts which have reference to the performance of the agreement of sale after it has been brought into existence.

The distinction is made in a West Virginia case and is well illustrated by the facts of that case.<sup>1</sup>

<sup>4</sup> *Adams v. Bridges*, 141 Ga. 418, 81 S. E. 203.

<sup>1</sup> *Turner v. McCormick*, 56 W. Va. 161, 49 S. E. 28, 107 A. S. R. 904, 67 L. R. A. 853.

It will be noted that "acceptance" constituted the sole act of election, for, by the terms of the option, the price was payable one-third cash on delivery of deed, and the balance in two equal annual payments. The court very correctly said the case would not have been different in principle if the optionee had first given notice of his election and, on the following day, by another telegram, made the request referred to. Some importance is attached to the fact that the acceptance was "according to the terms of the option." The court distinguished *Potts v. Whitehead*, 23 N. J. Eq. 512, because of this fact, and on the further ground that the time for the payment of the installments of the price was not fixed by the terms of the option. Also *Sawyer v. Brossart*, 67 Iowa 678, 25 N. W. 876, 56 Am. Rep. 371, on the ground that the acceptance made payment of the price at a place other than that of the optionor, the place fixed by law. Also *Corcoran v. White*, 117 Ill. 118, 7 N. E. 525, 57 Am. Dec. 858, because there was no acceptance and indicating an intention on the part of the optionee not to accept if the title was not perfect. The court also distinguishes a line of decisions (cited) holding that an acceptance fixing a place for the delivery of the deed and payment of the price other than the residence of the optionor, or the place named in the option, is unconditional, on the ground that in none of the decisions did it appear that there was an "unequivocal and definite acceptance as in this case," and adds: "Moreover the reasoning in some of the cases is not satisfactory . . . If a man says 'I accept

It involved an option on coal lands by the terms of which the optionee was given until a certain day to accept, and fixed the price at a certain sum per acre, "one-third to be paid in cash on delivery of deed and the balance in two equal annual payments."

The option further provided that the optionor would, within ninety days after notice in writing of election to purchase, execute a good and sufficient deed to the optionee. The written notice of election was as follows: "I hereby notify you that your coal land will be accepted according to the terms of the option given me on same and respectfully request you to make delivery of deed with abstract of title to me" on a certain day after the expiration of the time limit, at "hour and place to be decided later," the place being where the option was executed.

The suit was for specific performance and one of the defenses was that the notice of election was conditional because of the request therein that the deed be delivered on the 28th of June, 1902, which was a date more than ninety days after the first of March, the time limit for "acceptance," and more than ninety days after the notice of "acceptance" within which, by the terms of the option, the optionor was to make his deed. The court held the "request" did not make the election conditional; that it related to the performance of the contract and was not an element in its making, although written and connected with the acceptance, on a

your offer,' that makes a contract. It assents to all the terms of the offer. . . . How can a mere request relating not to the making of the contract, but to its performance, be deemed to change it?"

single sheet of paper, so as to make of the acceptance and request a compound sentence.

SEC. 844. UNCONDITIONAL ELECTION. KREUTZER v. LYNCH.—In this case<sup>1</sup> the notice of election, in the form of a letter, dated at W, where the optionee resided, was sent by post to the optionor at B in the same state, where the optionor resided. The option ran for thirty days and fixed the price at \$6000. The notice of election was as follows: “Your option (describing the option and the land, and reciting assignment to plaintiff) is hereby accepted. Please forward deed and abstract of title to (bank) of W, Wis., with instructions to the bank to let us inspect the papers and if the title is found perfect to deliver to us on payment of \$6000. Make deed to (a certain) Co.” The optionor refused to convey and suit for specific performance was brought. The trial court held that the notice of election was a “categorical acceptance” of the option, and that the portion thereof with reference to the deed, abstract, etc., was not intended by plaintiff, nor understood by defendant, as a qualification of such “acceptance,” but merely a convenient method of closing the trade by reason of a suggestion made in a conversation that it might be closed by correspondence. Judgment went for plaintiff for specific performance and the defendants appealed. The Supreme Court held that, upon the facts stated, the option was “accepted”

<sup>1</sup> Kreutzer v. Lynch, 122 Wis. 474, 100 N. W. 887, the optionors were partners for the management and sale of lands; option was given by the managing partner; the decree for specific performance was directed against both partners; also Cates v. McNeil, (Cal.) 147 P. 944.

according to its exact terms and without qualification.

In the Turner case<sup>2</sup> the price was payable one-third cash upon delivery of the deed and the balance in two equal annual installments. In the case under consideration there was no express stipulation with reference to the time of payment of the price. The law, therefore, fixed the time as of the delivery of the deed. In principle, therefore, the two cases are the same. In neither case was there a tender, and in neither case was a tender necessary, because tender of the price was not, by the terms of the option, made one of the acts necessary to constitute an election. In the language of the Turner case, tender or payment of the price under this particular form of option is performance of the contract arising from the act of "acceptance" and is governed by the rules on that subject relating to agreements of sale to the effect that payment of the price is concurrent with tender of the deed.

In the case under consideration, the defendants raised the point that no tender of the price and demand for deed had been made. The court intimated that tender should have been made, but turned the point against defendants by holding that the optionor, having denied the existence of the contract and notified the optionee that no conveyance of the land would be made, waived tender of the price "as a necessary step to the placing of the optionee in default."

<sup>2</sup> See Sec. 843, *supra*.

**SEC. 845. UNCONDITIONAL ELECTION.**  
**HORGAN v. RUSSELL.**—This was an option<sup>1</sup> running thirty days from date, on certain land, for the sum of \$1600 and by its terms required the optionees to signify “their intentions to take or reject the same by due notice in writing within the time above specified and their failure to serve such notice, . . . shall terminate this option without further notice, time being the essence of this agreement.” The option further provided that in case notice was served in due time, thirty days would be given in which to examine abstract, make deeds, and close sale.

The optionees, in due time, served notice signifying their intention to take the land, setting forth that the optionees “are ready, able and willing to perform each and all of the terms thereof at such time and in such manner as may be designated by you according to the terms of said contract, and for that purpose are ready, able and willing to deposit the sum of \$1600 to your credit, in such time and place and manner as may be designated by you, and hereby demand an abstract and deed of said land.”

It was argued that the “acceptance” was conditional because an abstract of title was demanded and also because the optionor was asked to desig-

<sup>1</sup> *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150, distinguishing, *Beiseker v. Amberson*, 17 N. D. 215, 116 N. W. 94, which involved a mere offer to sell land by saying that, in the letter of acceptance in the latter case, the optionee qualified his acceptance by the imposition of new terms, requiring the optionor to transmit the deed to the optionee at a place other than that required by the offer. The optionee also requested the optionor to assign the insurance policy on the property, and there was no tender of the price which was payable in “cash”; see, also, *Gibbins v. Asylum Dist.*, 11 Beav. 1, 17 L. J. Ch. 5, 50 Eng. Reprint 716.

nate a time, place and manner of deposit and performance. The court noting the distinction between election under the option and performance of the contract arising therefrom, held that the first part of the written election was an unqualified and unconditional "acceptance," and that the latter part with reference to an abstract and other matters was not a part of the "acceptance" but had reference solely and only to the performance of the contract after election, and that, therefore, the "acceptance" was not conditional.

SEC. 846. UNCONDITIONAL ELECTION. **McCORMICK v. STEPHANY.**—This was an option<sup>1</sup> contained in a lease giving the lessee the right or option to purchase the leased premises, at a certain price, in case the lessor should find a purchaser for the premises. In other words, the lease gave the lessee the "preferential right" to purchase. It appeared the lessor found a purchaser, and the lessee thereupon gave written notice to the lessor, of the exercise of the option to purchase the premises, at the stipulated price, and that the same would be paid on tender of a deed "with full covenants," there being no such requirement in the lease or option. Later, the lessee tendered the price and demanded a deed "with full covenants, free of all encumbrances." The lessor, on the following day, refused to make a deed "with full covenants

<sup>1</sup> *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25, the facts as reported, show that the lessee refused to give the deed upon the express ground that he was not, by the terms of the lease, required to give such kind of deed. But the refusal is a negligible quantity. Followed and approved in *Myers v. Metzger*, 61 N. J. Eq. 522, 48 Atl. 1113.

free of all encumbrances," giving as a reason that the lessee was not entitled to that kind of a deed under the lease, or otherwise.

Suit was brought for specific performance, and the decree went for the lessee requiring merely that the lessor execute "a good and sufficient deed for the premises," upon payment, etc., and not requiring a deed with full covenants.

The case was appealed and on appeal it was urged that the demand by the lessee, in his notice of election to purchase, for a deed with full covenants, was not in accordance with the provisions of the lease, was conditional and was, therefore, a rejection, and operated as a forfeiture of the option privilege. The court of chancery held that the option clause in the lease was not a "mere offer," which being without consideration must be accepted in the terms of the offer and which must be held to be rejected by a conditional acceptance, but was rather a completed purchase of the right to have a conveyance, if the purchaser should choose to buy upon the terms named, and that, therefore, a demand in the notice of election for more than the option contract obligated the optionor to convey, should not be held to be a rejection of the privilege to purchase, thus enabling the optionor to retain the consideration paid, and to refuse to convey, and that, consequently a subsequent demand (by way of amendment to the complaint for specific performance) in accordance with the terms of the option, was binding upon the optionor. The judgment of the trial court was affirmed.



SEC. 847. UNCONDITIONAL ELECTIONS. OTHER CASES.—Where the contract bound the purchaser to reconvey the premises to the vendor on his electing to repurchase, and giving notice of his intention to do so, before a designated day, a notice of election to repurchase is not invalidated merely because it improperly requires the purchaser to go to a designated office for the price and make deed,<sup>1</sup> or because it proposed to transact the business through a bank at H, where the optionee resided,<sup>2</sup> as such acts are not elements of acceptance but performance of the contract.<sup>3</sup>

Where the terms of the option were \$6000 cash and a note for \$16,000 to be secured by mortgage to be paid in one year with interest, notice of election offering to pay \$16,000 cash together with interest on \$10,000 for one year, was a sufficient acceptance.<sup>4</sup> An “acceptance” of a cash offer of \$3500 is not made conditional by offering \$500 before delivery of the deed.<sup>5</sup>

Where, in a suit for specific performance, the defendant (optionor) alleges that he refused to accept a tender of the price because the money was not derived from a certain source (proceeds of the farm optioned), he thereby estops himself to claim the tender was not good because conditional, in that

<sup>1</sup> *Robling v. Thole*, 256 Ill. 425, 100 N. E. 138.

<sup>2</sup> *Matson v. Schofield*, 27 Wis. 675; see *Curtis L. & L. Co. v. Interior L. Co.*, 137 Wis. 341, 118 N. W. 853, place of payment.

<sup>3</sup> *Long v. Needham*, 37 Mont. 408, 96 P. 731.

<sup>4</sup> *Zimmerman v. Brown*, (N. J. Eq.) 36 Atl. 675.

<sup>5</sup> *Veith v. McMurtry*, 26 Neb. 341, 42 N. W. 6.

the optionee demanded a warranty deed, not authorized by the option.<sup>6</sup>

Demand for an abstract of title and a suggestion that the deed be delivered, and the purchase price paid, at the lessee's residence, does not defeat his right to specific performance, on the ground that the election was conditional, in a lease giving him the "first refusal" to purchase the premises, where the lessee during the term sold the premises to a third person without giving lessee an opportunity to purchase.<sup>7</sup>

Demand by an optionee of the execution of the deed by both husband and wife, when the wife alone is optionor, does not imply a demand for a deed of the husband, where it does not appear that the optionee imposed such condition to his acceptance, but asked it as a matter of custom or form.<sup>8</sup>

Where, after the grant of an option to purchase land at a certain price per acre, the optionor cut timber from the land, a notice of election with the added condition "less the loss in value of the timber occasioned by removal" was sufficient.<sup>9</sup>

When, by the term of the option, it was the duty of the optionor to prepare and present his deed on tender of the price, the fact that the optionee tendered a deed to the optionor for execution which

<sup>6</sup> Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763, the facts show estoppel; the court calls it waiver.

<sup>7</sup> Harper v. Runner, 85 Neb. 343, 123 N. W. 313.

As to demand for evidence of title, see Taylor v. Newton, 152 Ala. 459, 44 So. 583.

<sup>8</sup> Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118.

<sup>9</sup> McCowen v. Pew, 18 Cal. App. 302, 123 P. 191, under California Civil Code, Sec. 3386.

contained provisions not authorized by the option, can not avail the optionor.<sup>10</sup>

An "acceptance" is not made conditional by demanding that the optionor shall perform the option agreement on his part.<sup>11</sup>

Where a lessee having an option to purchase the premises for a specified sum, exercised the option, and offered to pay the price, on the lessor producing a certificate of good title and depositing in escrow a deed conveying good title, and the lessor made no objection to the conditions accompanying the offer of payment, any objections were waived, and the offer of payment was sufficient to authorize specific performance.<sup>12</sup>

SEC. 848. TIME OF ELECTION. GENERALLY.—The time limit on the exercise of the option right by the optionee, is usually, but not always, expressly fixed by the option contract.<sup>1</sup> If the time limit is expressly fixed and the optionee fails to exercise his right to purchase and to give notice to the optionor within the time limit, his

<sup>10</sup> Consolidated Coal Co. v. Findley, 128 Iowa 696, 105 N. W. 206.

<sup>11</sup> Raffety v. Schofield, L. R. 1 Ch. 937, 66 L. J. Ch. 448, 76 L. T. Rep. (N. S.) 648, 45 Wkly. Rep. 460.

<sup>12</sup> Cates v. McNeil, (Cal.) 147 P. 944.

Generally: See Friendly v. Elwert, 57 Ore. 599, 105 P. 404, 112 P. 1085, Ann. Cas. 1913A, 357, statements made with reference to title and deed.

<sup>1</sup> See Sec. 849, *et seq.*

Case where the price was to be fixed by the trustee of the testator (optionor), and optionee to have one month thereafter to accept, Lilford v. Keck, 30 Beav. 295, 54 Eng. Reprint 902.

Where inventory was to be made, Baker v. Shaw, 68 Wash. 99, 122 P 611.

rights under the option are at an end,<sup>2</sup> except in a few instances exhibited by decisions referred to later on, in which the courts, upon broad equitable grounds, have recognized and enforced elections made and notices given after the expiration of the contract time.<sup>3</sup>

If the option contract does not expressly fix its time limit the law fixes a reasonable time,<sup>4</sup> and, therefore, it is not void for uncertainty,<sup>5</sup> nor does it offend the rule against perpetuities.<sup>6</sup>

Speaking generally, it is the rule that the optionee is held to a strict performance of the option contract, time of election being the essence of such contracts whether or not expressly so provided therein.<sup>7</sup> Again, the option contract may be so worded as to require payment or tender of the whole or some part of the price at the time of election.<sup>8</sup> In such case timely payment or tender is as

<sup>2</sup> *Cummings v. Town Lake Realty Co.*, 86 Wis. 382, 57 N. W. 43; *Potts v. Whitehead*, 21 N. J. Eq. 55, affirmed 23 N. J. Eq. 512; *Britton v. Phillips*, 24 How. Pr. (N. Y.) 111; *McConkey v. Peach Bottom Slate Co.*, 68 Fed. 830, 16 C. C. A. 8, affirmed 161 U. S. 500, 40 L. Ed. 786, 16 S. Ct. 640.

Time of election fixed by happening of contingency, *Hill v. Mathews*, 78 Mich. 377, 44 N. W. 286; *Mactier's Adm'rs v. Frith*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262.

When election and withdrawal are simultaneous, see Sec. 704, note 9.

<sup>3</sup> But as a rule only because of the inequitable act, default or fraud of the optionor. See *Steele v. Bond*, 32 Minn. 14, 18 N. W. 830, or because of accident, etc., see Sec. 864. See also decisions in Sec. 867, *et seq.*

<sup>4</sup> Sec. 856.

<sup>5</sup> Sec. 222.

<sup>6</sup> Sec. 222.

<sup>7</sup> Sec. 862.

<sup>8</sup> Sec. 916; *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; *Killough v. Lee*, 2 Tex. Civ. App. 260, 21 S. W. 970.

much a necessary part of the election as notice, unless the conduct of the optionor has been such as to excuse or waive payment or tender.<sup>9</sup>

### SEC. 849. SPECIFIED TIME. GENERALLY.

—Where, by the terms of the option contract, the time of election is expressly limited, an election after the expiration of that time will not, as we have seen, raise a binding contract. In other words, to raise a binding promise on the part of the optionor to sell, the election must be made within the time stipulated in the option.

The option privilege is withdrawn by expiration of the time limit where there is no election.<sup>1</sup> No rights can accrue to the optionee by an election after the time limit has expired.<sup>2</sup>

<sup>9</sup> Secs. 920, 923.

<sup>1</sup> Notice is not necessary to terminate. See Sec. 707, note 3.

<sup>2</sup> *Raymer v. Hobbs*, (Cal. App.) 146 P. 906; *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853; *Finn v. Bowden*, 66 Fla. 41, 63 So. 139; *Larned v. Wentworth*, 114 Ga. 208, 39 S. E. 855; *Spafford v. Hedges*, 231 Ill. 140, 83 N. E. 129; *Bashor v. Cady*, 2 Ind. 582; *Peterson v. Rankin*, 161 Iowa 431, 143 N. W. 418; *Frey v. Camp*, 131 Iowa 109, 107 N. W. 1106; *Jennings etc. Syndicate v. Oil Co.*, 119 La. 793, 44 So. 481; *Bennett v. Giles*, 220 Ill. 393, 77 N. E. 214; *Cameron v. Shumway*, 149 Mich. 634, 113 N. W. 287, extension; *Anderson Carriage Co. v. Gilmore*, 129 Mo. App. 644, 108 S. W. 594; *Levin v. Dietz*, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. (N. S.) 251; *Atlantic Product Co. v. Dunn*, 142 N. C. 471, 55 S. E. 299; *Herman v. Winter*, 20 S. D. 196, 105 N. W. 457; *Longworth v. Mitchell*, 26 Ohio St. 334; *Kingsley v. Kressly*, 60 Ore. 167, 118 P. 678, Ann. Cas. 1913E, 746; *Witherspoon v. Staley*, (Tex. Civ. App.) 156 S. W. 557; *I. X. L. etc. House v. Berets*, 32 Utah 454, 91 P. 279; *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830; *Nelson v. Stephens*, 107 Wis. 136, 82 N. W. 163; *Waterman v. Banks*, 144 U. S. 394, 36 L. Ed. 479, 12 S. Ct. 646; *Guss v. Nelson*, 200 U. S. 298, 50 L. Ed. 489, 26 S.

These general statements are taken from numerous decisions cited in the note, and will find support in them and in many others cited throughout this book.<sup>3</sup>

The law of waiver, however, applies to the timeliness of the notice, and the law of estoppel may also be invoked where the conduct of the optionor justifies its application. These subjects will be found discussed elsewhere.<sup>4</sup>

It should be remembered that the rules stated are those with reference to the ordinary option to purchase property. Where the option is one of sale and return, or sale on approval, failure to exercise the option within the specified time, depending of

Ct. 260, affirmed s. c. 14 Okl. 296, 78 P. 170, sale or return; *Vanderlip v. Peterson*, 16 Manitoba 341; *Ranelagh v. Melton*, 34 L. J. Ch. 227, 11 L. T. Rep. 409, 62 Eng. Reprint 627; *Barrell v. Sabine*, 1 Vern. 268, 23 Eng. Reprint 462; *Master v. Willoughby*, 2 Bro. P. C. 244, 1 Eng. Reprint 919; *Brooke v. Garrod*, 3 Kay. & J. 608, 69 Eng. Reprint 1252.

- 2 A proviso in an option fixing a time limit that if payment is not timely made the optionor may cancel it, does not change the rule, *Paterson v. Houghton*, 49 Manitoba 168; see *Peirson v. Corporation*, 11 Brit. Col. 139.

The rule applies to the hour fixed as well as to the day, *Olsen v. Northern S. S. Co.*, 70 Wash. 493, 127 P. 112; *Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636.

- 3 Where an offer by letter expressly requires answer by "return mail," an acceptance by return mail is necessary to raise a binding contract, *Taylor v. Rennie*, 35 Barb. (N. Y.) 272, 22 How. Pr. 101; *Ackerman v. Maddux*, 26 N. D. 50, 143 N. W. 147; see *Bernard v. Torrance*, 5 Gill. & J. (Md.) 383; *Maclay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35; *Horne v. Niver*, 168 Mass. 4, 46 N. E. 393.

An offer by telegram impliedly requires a "quick" reply, *Thompson v. Burns*, 15 Idaho 572, 99 P. 111; *Ferguson v. West Coast Shingle Co.*, 96 Ark. 27, 130 S. W. 527, delay of four days.

<sup>4</sup> Sec. 868.

course on the terms of the contract, is deemed an election to purchase.<sup>5</sup>

SEC. 850. SPECIFIED TIME. CONSTRUCTION. GENERALLY.—In computation of time, fraction of day is not reckoned, and when the act required by contract is to be done within a specified time, or after a particular day, the general rule is to exclude the first and include the last day of the specified term.<sup>1</sup>

The optionee has until midnight of the last day of the option time within which to elect and give notice.<sup>2</sup> Saturday half holiday must be counted as a day in computing the time within which a tenant may give notice to renew his lease; the rule *de minimis* does not apply.<sup>3</sup> When the time to elect and give notice falls on Sunday, an election on the following Monday is sufficient.<sup>4</sup> But under the statute of New York, when the option expires on a holiday, (January 1st) which was not Sunday, the time for election was not extended until the next business day.<sup>5</sup>

<sup>5</sup> See Secs. 828-830. As to renewals and extensions of leases, see Secs. 831-836.

When party has option of two or more ways of performing, he must make election before time expires or he loses his right to elect, *Mueller v. Pels*, 94 Ill. App. 353, affirmed 192 Ill. 76, 61 N. E. 472. See Alternative Stipulation, Sec. 854.

<sup>1</sup> *Tilton v. Sterling C. Co.*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689.

<sup>2</sup> *Veith v. McMurtry*, 26 Neb. 341, 42 N. W. 6.

<sup>3</sup> *Jackson Brewing Co. v. Wagner*, 117 La. 875, 42 So. 356.

<sup>4</sup> *Smith v. Russell*, 20 Colo. App. 554, 80 P. 474.

<sup>5</sup> *Page v. Shainwald*, 169 N. Y. 246, 62 N. E. 356, option to return stock.

Under an option to extend 20 days from February 3rd, the optionor has the whole of February 23rd, within which to give notice of election.<sup>6</sup>

An option dated February 7th, providing that if “no written offer was received that day by mail the deal to be closed by Feb. 8th,” includes the latter day.<sup>7</sup> When the option time runs “until” a certain day, an election on that day is in time.<sup>8</sup>

An option to deliver stock “on or after three months from Nov. 6, 1891,” expired before April, 1896.<sup>9</sup>

A lease bore date March 24, '82, and provided that the lessee should hold the premises for twenty years and two months from March 1, 1882, paying certain rents, and also that the lessee should have the privilege of buying the premises at any time “within five years commencing from this demise,” and it was held the period of five years, within which the option could be exercised, expired March 1, 1887.<sup>10</sup>

Under an option by which the optionor agreed to convey coal, within eighteen months from date, and the optionee agreed to pay one-third of the price, in nine months, and the balance within eighteen

<sup>6</sup> *Holmes v. Myles*, 141 Ala. 401, 37 So. 588.

<sup>7</sup> *U. B. Blalock & Co. v. W. D. Clark & Bro.*, 133 N. C. 306, 45 S. E. 642.

<sup>8</sup> *Houghwout v. Boisabuin*, 18 N. J. Eq. 315.

<sup>9</sup> *McCracken v. Harned*, 66 N. J. L. 37, 48 Atl. 513.

“By the first day of August,” means on or before August first, *Parker v. McAllister*, 14 Ind. 12.

<sup>10</sup> *Lorillard v. Company*, 48 N. J. Eq. 295, 22 Atl. 203, affirming s. c. 19 Atl. 381.



months from date, the optionee must exercise his option within the nine months.<sup>11</sup>

An option to purchase contained in a lease for ten years, stipulating that, in case the lessee shall not exercise his option to purchase, within two years from the date of the lease, “then” the right to purchase shall absolutely determine, except that he, after having paid the rent for the term, shall “then” have the right and option to purchase for a specified price, need not be exercised at the time of the last payment of rent, but may be exercised at the expiration of the term; for the word “then” is used in the sense of “in the event of,” or “in such case.”<sup>12</sup>

SEC. 851. SPECIFIED TIME. CONSTRUCTION. “EXPIRATION” CLAUSES.—An option contract stipulated that “on payment of \$50 on or before May 1st next (1895) the option would be extended until May 1st, 1896. On receipt of seven days’ notice in writing at any time before expiration of this option,” the optionor will execute warranty deeds. The \$50 was duly paid and notice of election to purchase was given April 30, 1896, and it was held the notice of election was given in time as it was not necessary to give it seven days before the expiration of the option.<sup>1</sup>

<sup>11</sup> *Weaver v. Sides*, 216 Pa. 301, 65 Atl. 666.

<sup>12</sup> *Cates v. McNeil*, (Cal.) 147 P. 944.

<sup>1</sup> *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580, holding the seven days’ notice had nothing to do with the option; the giving of the notice was the method of exercising the option and the day of giving the notice was the time of exercising the option.

An ordinance granting a water works franchise provided that, at any time after the expiration of fifteen years from the completion of the plant, the city should have the right to purchase the same by giving the owners one year's notice in writing. The franchise grant was for fifty years, and it was held the city was not compelled to wait the expiration of the fifteen year period before serving notice, but could serve it one year before the period expired.<sup>2</sup>

The same ruling was made where the seller agreed to repurchase, if the buyer wished to sell, provided the seller was given 30 days' notice in writing of such wish, the court holding the buyer had to and including the last day of the time to give the 30 days' notice.<sup>3</sup>

Under an agreement to sell land giving the purchaser 10 days in which to investigate the title and to a return of the earnest money if the title was defective, failure to elect within the limit of the 10 days, will bar a suit for specific performance where the title was regular.<sup>4</sup>

## SEC. 852. SAME. LEASES AND RENEWALS.—With reference to options to purchase in

<sup>2</sup> Valparaiso City Water Co. v. City, 33 Ind. App. 193, 69 N. E. 1018.

Agreement construed and held to give the City the option to purchase after the appraisal of the value of the water plant, Farmington Village Corp. v. Farmington Water Co., 93 Me. 192, 44 Atl. 609; distinguishing Montgomery Gaslight Co. v. City, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

In Marino v. Williams, 30 Nev. 360, 96 P. 1073, the lessee was held entitled to wait until after the appraisal of the rent for the renewed term to exercise his option to renew.

<sup>3</sup> Maguire v. Halstead, 45 N. Y. S. 783, 18 App. Div. 228.

<sup>4</sup> Hollmann v. Conlon, 143 Mo. 369, 45 S. W. 275.

leases, the general rule seems to be that the notice must be given within the stipulated time before the expiration of the term of the lease. Thus, a lessee was to have the privilege of purchasing the fee, at a fixed price, at any time within five years, upon giving thirty days' notice of his intention, and paying one-fourth of the purchase money, and it was held that notice given two days before the expiration of the five years was too late.<sup>1</sup>

The decisions, however, are not in harmony as to the construction of particular clauses. Thus, a lease gave a lessee the privilege of purchasing the land "at the expiration" of the lease, which was twelve o'clock on the night of December 31st, and it was held the lessee had the following day within which to elect.<sup>2</sup> Where the option grants the privilege of purchasing at any time during the "term," the optionee is not limited to an exercise of the privilege at the end of the term, but may do so at any time during the term of the lease.<sup>3</sup>

Another rule with reference to leases is that where the option gives the lessee the right to purchase at any time during the continuance or term of the lease, the right must be exercised during the

<sup>1</sup> *Mason v. Payne*, 47 Mo. 517, the court ruling the notice clause was of the essence of the contract; also *Magoffin v. Holt*, 62 Ky. (1. Duv.) 95; see also, *Carter v. Phillips*, 144 Mass. 100, 10 N. E. 500, as to time being of essence of contract; and, also, Sec. 862.

<sup>2</sup> *Herman v. Winter*, 20 S. D. 196, 105 N. W. 457; *Gray v. Maier & Zobelein Brewery*, 2 Cal. App. 653, 84 P. 280; *Contra*, *I. X. L. etc. House v. Berets*, 32 Utah 454, 91 P. 279; *Tilton v. Sterling C. & C. Co.*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689.

<sup>3</sup> *Lee v. Cochran*, 157 Ala. 311, 47 So. 581; *Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265, Ann. Cas. 1912C, 556, the lease gave an option to purchase "at any time" and was construed as requiring the election during the term.

life of the lease. Consequently an election made after the expiration of the term is not in time.<sup>4</sup>

The same rule obtains where the option is one to renew the lease. Thus, a lease granting the privilege of renewal "at the expiration of the term," binds the lessee to elect at a point of time at or before the old lease expired.<sup>5</sup> And it is likewise in an option to renew an agreement for the purchase and delivery of salt;<sup>6</sup> or for the renewal of an agreement to furnish electric current.<sup>7</sup>

SEC. 853. SAME. OPTION TO SELL OR REPURCHASE.—Under the option of resale the seller is not obligated to repurchase until after the expiration of the stipulated time. Consequently, where the option provided that if the purchaser

<sup>4</sup> *Atlantic Product Co. v. Dunn*, 142 N. C. 471, 55 S. E. 299, citing *Alston v. Connell*, 140 N. C. 485, 53 S. E. 292, and holding that tender of rent after expiration of lease did not restore lessee's rights, nor did the fact that the lessee had made improvements.

Of course this rule does not apply, where the option is made to run after the expiration of the lease term, *Prout v. Roby*, 15 Wall. (U. S.) 471, 21 L. Ed. 58, or where the lease provides for a renewal and gives an option to purchase "at any time during the tenancy." In such case if there is a renewal, an election to purchase during the renewal period is good, *Congregation etc. v. Gerbert*, 57 N. J. L. 395, 31 Atl. 383.

<sup>5</sup> *I. X. L. etc. House v. Berets*, 32 Utah, 454, 91 P. 279, 281; see *Shamp v. White*, 106 Cal. 220, 39 P. 537; *Darling v. Hoban*, 53 Mich. 599, 19 N. W. 545; *Renoud v. Daskam*, 34 Conn. 512; *Thiebaud v. First Nat'l Bank*, 42 Ind. 212; *Moss v. Barton*, L. R. 1 Eq. 474, 35 Beav. 197, 13 L. T. Rep. (N. S.) 623, 55 Eng. Reprint 570; *Hersey v. Giblett*, 18 Beav. 174, 23 L. J. Ch. 818, 52 Eng. Reprint 69.

<sup>6</sup> *San Pedro Salt Co. v. Hauser Packing Co.*, 13 Cal. App. 1, 108 P. 728, the court saying there is no contract to "renew" after the expiration of the old one.

<sup>7</sup> *Monmouth Co. El. Co. v. Consolidated Gas Co.*, 83 N. J. L. 53, 83 Atl. 900.

should become dissatisfied with the stock, the seller would, at the expiration of six months from date of sale, repurchase the same, the option is not enforceable until after the expiration of the specified period, and an election to resell the day before the expiration of the time, is premature.<sup>1</sup>

The rule of the Montana decisions just cited is probably too broadly stated. The court probably intended to hold only that under the agreement there in question, the obligation of the seller to repurchase did not arise until after the expiration of the time limit, but it is not apparent why the buyer could not, at any time before the expiration of the time limit, exercise his option to resell and give notice. Exercising the option and enforcing rights thereunder are clearly different and distinct matters, in the absence of an express provision limiting the time of giving notice as concurrent with the expiration of the option time. Thus, it is held in California, that an agreement providing that if the vendee should be dissatisfied with the land at the end of the year, and should give the vendor thirty days' notice and a release of title, the latter would return the price paid with interest, a notice of dissatisfaction with offer of release given and tendered seventy-eight days before the expiration of the year is good.<sup>2</sup>

It is generally held of options like those under

<sup>1</sup> *Porter v. Plymouth Gold M. Co.*, 29 Mont. 347, 74 P. 938, 101 A. S. R. 569; also, *Schultz v. O'Rourke*, 18 Mont. 418, 45 P. 634.

It is otherwise where the option is to repurchase "on or before 12 months from date," *Scott v. Goodin*, 21 Cal. App. 178, 131 P. 76.

<sup>2</sup> *Herberger v. Husman*, 90 Cal. 583, 27 P. 428; also, *Union Coll. Co. v. Oliver*, 23 Cal. App. 318, 137 P. 1082, guaranty to refund "in 12 months from date."

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consideration, that the time for the exercise of the option arises upon the date fixed and may be exercised within a reasonable time thereafter.<sup>3</sup>

Under an option to re-purchase "at the expiration of three years," the time to elect and give the required thirty days' notice is within a reasonable time after the expiration of the three years.<sup>4</sup>

#### SEC. 854. ALTERNATIVE STIPULATIONS.

—Where the contract is in the alternative, the party bound must make his election on the day the promise is to be performed,<sup>1</sup> and if he fails to do so, he loses his election and the promisee may elect which alternative he will demand.<sup>2</sup> And when the election is with the promisee under a covenant to pay a certain sum of money on a certain day, or return a certain bond, and the promisee does not elect on or before such day, the obligation to pay the money becomes absolute.<sup>3</sup>

<sup>3</sup> See Sec. 858; *Hollis v. Libby*, 101 Me. 302, 64 Atl. 621, holding one year and eight months after the time fixed is not reasonable; except under special circumstances, *Moench v. Hower*, 137 Iowa 621, 115 N. W. 229.

<sup>4</sup> *Rogers v. Burr*, 97 Ga. 10, 25 S. E. 339, s. c. 105 Ga. 432, 31 S. E. 438, 70 A. S. R. 50. The Supreme Court of Utah in *Tilton v. Sterling C. & C. Co.*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689, says this decision is incorrect and refused to apply it to an option to purchase the property "at the expiration" of the lease and holding that "at the expiration" means the day the lease expired.

<sup>1</sup> *Rewrick v. Goldstone*, 48 Cal. 554; *Center v. Center*, 38 N. H. 318; *Marshall v. Ferguson*, 23 Cal. 65.

<sup>2</sup> *McNitt v. Clark*, 7 Johns. (N. Y.) 465; *Haskins v. Dern*, 19 Utah 89, 56 P. 953; *Crowl v. Goodenberger*, 112 Mich. 683, 71 N. W. 485.

<sup>3</sup> *Ramsey v. Walthan*, 1 Mo. 395.

*Choice v. Moseley*, 1 Bailey (S. C.) 136, 19 Am. Dec. 661, holding failure to perform either stipulation is breach by the promisor where the election is with him.

Defendant contracted with plaintiff and other stockholders of a corporation to cause to be returned to them their notes given for stock, on surrender of certificates for the stock and relinquishment of all claims against the corporation. Plaintiff, a stockholder, was not a party to the original agreement, but learning of the agreement, was told he was entitled to the benefit of it, but delayed for a year after he knew he was entitled to such benefit, and after defendant had secured his notes and it was held that plaintiff's failure to elect, within a reasonable time to accept the benefits of the agreement, barred any rights he might have under the agreement.<sup>4</sup>

SEC. 855. CLAUSE RESERVING TO OPTIONOR RIGHT TO SELL.—An option to renew a lease, provided the premises are not disposed of before the expiration of the leased term, is terminated by a conveyance made in good faith by way of advancement and, of course, an election made after that event is too late,<sup>1</sup> but the optionee in a lease giving the lessees the "first refusal," at a certain price, at any time they wish to do so, requires the lessor, if he desires to sell the premises, to give notice thereof to the lessees and if they refuse to purchase, the lessor may then sell to others at any price he sees fit, but that until such notice is given, the lessees have the option to purchase at any time during the existence of the lease.<sup>2</sup>

<sup>4</sup> Libbey v. Packwood, 11 Wash. 176, 39 P. 444.

<sup>1</sup> Elston v. Schilling, 42 N. Y. 79.

<sup>2</sup> Schroeder v. Gemeinder, 10 Nev. 355; see, Bettens v. Hoover, 12 Cal. App. 313, 107 P. 329; Cummings v. Nielson, 42 Utah 157, 129 P. 619.

Under an option whereby the lessor agreed that it would give the lessee the opportunity to purchase, the lessor on deciding to sell was merely bound to notify the lessee and to give him an opportunity to buy upon the terms fixed by the lessor.<sup>3</sup> But upon a sale of the property in partition proceedings caused by the optionors, the option became enforceable by the optionee, though the option provided that the optionors would not sell the property without first notifying the optionee of their intention to sell, as the proceedings were a manifestation of their intention to sell.<sup>4</sup>

A lease of a store "to hold for the term of three years," with the privilege of "two years in addition unless the (lessor) shall sell said store, in which case the privilege of two years in addition shall be null and void," becomes null and void and the privilege also becomes void in case of a sale by the lessor either before the beginning or during the running of the two years.<sup>5</sup>

An owner of slaves agreed to sell the residue of them after selecting three for himself and subsequently he sold three of the slaves, and it was held thereby he elected to sell the residue.<sup>6</sup>

<sup>2</sup> The time within which to elect does not run until optionee is notified that the option had been awarded to him as one of several successive optionees under his father's will, *Austin v. Tawney*, L. R. 2 Ch. 143.

<sup>3</sup> *Chandler & Co. v. McDonald-Weber Co.*, 215 Mass. 365, 102 N. E. 319.

<sup>4</sup> *Myers v. Metzger*, 61 N. J. Eq. 522, 48 Atl. 1113, reversed on other grounds, 63 N. J. Eq. 779, 52 Atl. 274.

<sup>5</sup> *Knowles v. Hull*, 97 Mass. 206.

<sup>6</sup> *Arnold v. Arnold*, 17 N. C. 467.



SEC. 856. REASONABLE TIME. GENERALLY.—A bare offer without time limit is ordinarily held to be withdrawn if not accepted immediately. This is undoubtedly true in those cases where the parties are personally present and the circumstances are such as to imply an immediate acceptance.<sup>1</sup> The nature of an option contract, in the absence of any restricting stipulations, implies that the optionee shall have a reasonable time to elect, and, therefore, the rule is that where the option contract does not expressly fix the time which the option privilege is to run, the law fixes a reasonable time, and, of course, the election must be made within such time.<sup>2</sup>

Whether what is a reasonable time in a particular case is a question of law to be decided by the court, or a question of fact to be found by the jury,

<sup>1</sup> *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 51 Atl. 853, 858; *Longworth v. Mitchell*, 26 Ohio St. 334.

<sup>2</sup> *Vassault v. Edwards*, 43 Cal. 458; *Fitzpatrick v. Woodruff*, 96 N. Y. 561; *Viser v. Rice*, 33 Tex. 139; *Larmon v. Jordan*, 56 Ill. 204; *New England Box Co. v. Prentiss*, 75 N. H. 246, 72 Atl. 826; *Bowen v. McCarthy*, 85 Mich. 26, 48 N. W. 155; *Eaves & Collins v. Iron Co.*, 73 Ga. 459; *Topping v. Root*, 5 Cow. (N. Y.) 404; *Minn. etc. Ry. Co. v. Columbus etc. Co.*, 119 U. S. 149, 30 L. Ed. 376, 7 S. Ct. 168; *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485; *Hanley v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *Brooks v. Trustee Co.*, 76 Wash. 589, 136 P. 1152; *Cummings v. Nielson*, 42 Utah 157, 129 P. 619, stock; *Heydrick v. Dickey*, 154 Ky. 475, 157 S. W. 915, 159 S. W. 666.

An offer to sell real estate made by telegram requires an answer within the time specified, and if no time is specified, then within a reasonable time, and impliedly a quick reply by telegram, *Thompson v. Burns*, 15 Idaho 572, 99 P. 111.

As to propositions by mail, *James E. Mitchell & Co. v. Wallace*, 27 Ky. L. Rep. 967, 87 S. W. 303.

As to renewals of leases, see Sec. 852.

As to option to return, etc., see Sec. 853, 858.

As to extensions, see Sec. 859.

is a subject involved in much judicial conflict.<sup>3</sup> It is believed, however, that when the question of reasonableness of time can be decided by the court without passing on the facts, it is a question of law for the court. Otherwise it is a question of fact to be submitted to the jury.<sup>4</sup>

Parol evidence is not admissible to show that at the time the option was executed the parties understood or agreed that it was to remain open for any specified time, nor to prove their understanding as to what would be a reasonable time.<sup>5</sup> Nor, may a suit for specific performance be resisted on the ground that the option was not fair because not limited in time.<sup>6</sup>

SEC. 857. REASONABLE TIME. CONSTRUCTION.—What is a reasonable time where the option is silent, is to be determined from all

<sup>3</sup> *Brooks v. Trustee Co.*, 76 Wash. 589, 136 P. 1152, law; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372, law; *Loeb v. Stern*, 198 Ill. 371, 64 N. E. 1043, law; *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88; *Standard Box Co. v. Mut. Biscuit Co.*, 10 Cal. App. 746, 103 P. 938, law; *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522, question of fact; *Elliott v. DeLaney*, 217 Mo. 14, 116 S. W. 494, question of fact; *U. B. Blalock & Co. v. W. D. Clark & Bro.*, 133 N. C. 306, 45 S. E. 642, question of fact; *Moxley's Administrators v. Moxley*, 59 Ky. 309.

<sup>4</sup> *Brooks v. Miller*, 103 Ga. 712, 30 S. E. 630; note to 17 Am. Dec. 544.

<sup>5</sup> *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88.

*Standard Box Co. v. Mut. Biscuit Co.*, 10 Cal. App. 746, 103 P. 938, term implied by law comes within rule.

<sup>6</sup> *Cummings v. Nielson*, 42 Utah 157, 129 P. 619.

Case where price for mine was made payable out of the gross output; proper to plead what is reasonable time, *Pritchard v. McLeod*, 205 Fed. 24, 123 C. C. A. 332.

Case where optionee was held estopped from asserting claim under option without time limit, as against third party, *Hanley v. Watter-son*, 39 W. Va. 214, 19 S. E. 536.

the facts and circumstances. The inquiry resolves itself into an investigation as to what time it is rational to suppose the parties contemplated, and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind.<sup>1</sup> Or, as said in another case, such time as is necessarily convenient to do what the contract requires to be done.<sup>2</sup>

Where one party to a contract agreed to furnish and the other party to receive 20,000 tons of iron ore, at the rate of fifty tons per day, with the right in the party furnishing it to elect to furnish a second lot of 20,000 tons, it was necessary to notify the other party of such election within a reasonable time, and the time allowed to complete the delivery of the first 20,000 tons would be the longest which could be allowed as a reasonable time.<sup>3</sup>

A contract to furnish coal, not fixing its duration, terminates by implication when the optioned coal becomes exhausted.<sup>4</sup>

<sup>1</sup> *Larmon v. Jordan*, 56 Ill. 204.

Decisions holding option not exercised within reasonable time: *Viser v. Rice*, 33 Tex. 139, two years; *Standard Box Co. v. Mut. Biscuit Co.*, 10 Cal. App. 746, 103 P. 938, ten months; *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485, ten months; *Noe v. Saylor*, 143 Ky. 254, 136 S. W. 209, ten months; *Rees v. Pellow*, 97 Fed. 167, 38 C. C. A. 94, stock, three months; *Kellow v. Jory*, 141 Pa. 144, 21 Atl. 522, four years; time fixed was "whenever called upon to" convey; *Swank v. Fretts*, 209 Pa. 625, 59 Atl. 264, two and one-half years; *Stevens v. McChrystal*, 150 Fed. 85, five years; *Bowen v. McCarthy*, 85 Mich. 26, 48 N. W. 155, thirty-four days.

<sup>2</sup> *Hollis v. Libby*, 101 Me. 302, 64 Atl. 621.

<sup>3</sup> *Eaves & Collins v. Iron Co.*, 73 Ga. 459.

<sup>4</sup> *McKell v. Chesapeake etc. R. Co.*, 186 Fed. 39, 108 C. C. A. 141 affirmed, 175 Fed. 321, 99 C. C. A. 109.

An offer to sell property of a fluctuating value, like shares of stock, must be exercised promptly.<sup>5</sup>

Where time of performance is not specified in the option contract and the parties arrange for the removal of encumbrances prior to performance, without naming a specified date, the removal of the encumbrances within a reasonable time is sufficient.<sup>6</sup>

A mere option to purchase land indeterminate as to time, and accompanied by a deed deposited in escrow, is terminable, at any time, upon reasonable notice by the vendor.<sup>7</sup>

**SEC. 858. REASONABLE TIME. CONSTRUCTION, CONTINUED.**—An agreement by a seller of bonds to allow the purchasers “at any time” to return the bonds and withdraw the investment with interest, merely gives the purchaser a reasonable time within which to act; the contract was not intended to run in perpetuity.<sup>1</sup>

An agreement by a seller of stock to take back the stock at cost without interest, at any time within a certain day, “if at that time you desire me to do so,” means that the election to return must be

<sup>5</sup> *McCracken v. Harned*, 66 N. J. L. 37, 48 Atl. 513, seven years not reasonable.

Six years unreasonable, *Brooks v. Trustee Co.*, 76 Wash 589, 136 P. 1152.

*Park v. Whitney*, 148 Mass. 278, 19 N. E. 161, seven months.

<sup>6</sup> *Cramer v. Mooney*, 69 N. J. Eq. 164, 44 Atl. 625.

<sup>7</sup> *Stone v. Snell*, 77 Neb. 441, 109 N. W. 750.

<sup>1</sup> *Brooks v. Trustee Co.*, 76 Wash. 589, 136 P. 1152; see, *Fitzpatrick v. Woodruff*, 96 N. Y. 561, three years reasonable time.

exercised at the specified date or within a reasonable time thereafter.<sup>2</sup>

An option to a purchaser to return the goods if not satisfied, must be exercised within a reasonable time.<sup>3</sup>

A contract for the repurchase of land and stipulating no time for performance, must be performed within a reasonable time, which means such time as would bar plaintiff's remedy if defendant's possession had been adverse.<sup>4</sup>

A purchaser of an article under an agreement giving him a specified period in which to use it and return it at the expiration of the period if dissatisfied, has the full period of the grant for the trial and has also, in the absence of any stipulation on the point, a reasonable time thereafter to signify his election to accept it or return it.<sup>5</sup>

Under an agreement giving a first refusal to purchase at a price offered by a third person, the optionee has a reasonable time to elect after notice of an offer by a third person.<sup>6</sup>

SEC. 859. EXTENSION OF TIME TO ELECT. GENERALLY.—The extension of the option time limit is in reality a new offer in the sense that unless the agreement for the extension is supported

<sup>2</sup> *Park v. Whitney*, 148 Mass. 278, 19 N. E. 161; also, *Hollis v. Libby*, 101 Me. 302, 64 Atl. 621.

<sup>3</sup> *Ide v. Brody*, 156 Ill. App. 479.

<sup>4</sup> *Magee v. Catching*, 33 Miss. 672.

<sup>5</sup> *Springfield Engine Stop. Co. v. Sharp*, 184 Mass. 266, 68 N. E. 224; *Dickey v. Winston Cigarette Mach. Co.*, 117 Ga. 131, 43 S. E. 493.

<sup>6</sup> *Jones v. Monerief-Cook Co.*, 25 Okl. 856, 108 P. 403.

by a new consideration, the offer may be withdrawn by the optionor at any time before acceptance. If, however, there is a new consideration to support the agreement for the extension, it is binding upon the optionor during the time fixed by the extension in the same manner as the original option where such option is supported by a consideration.<sup>1</sup>

If the option contract is extended and the optionee elects within the extended time, or where the time is not expressly stipulated, then within a reasonable time or before withdrawal by the optionor, the election ripens the option contract into a completed contract of sale.<sup>2</sup> On the other hand, if the optionee fails to elect until after the option is withdrawn, his rights are at an end.<sup>3</sup>

Where the extension does not expressly fix the time, or where it arises out of conduct, it seems that a reasonable time will be allowed.<sup>4</sup> But it is held,

<sup>1</sup> As to consideration, see Sec. 334.

While the extension is considered a new offer, still the contract rights of the parties will be determined by the original offer or option, the time only being extended. See *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37.

Correspondence held not to be an extension, *Peterson v. Rankin*, 161 Iowa 431, 143 N. W. 418.

An extension does not give lessee the right to another extension including the option privilege, *Pearce v. Turner*, 150 Ill. 116, 36 N. E. 962.

<sup>2</sup> *Vassault v. Edwards*, 43 Cal. 458.

<sup>3</sup> See, *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 A. S. R. 417; *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; *Standiford v. Thompson*, 135 Fed. 991, 68 C. C. A. 425, extension for payment; *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853; also, *Page v. Shainwald*, 169 N. Y. 246, 62 N. E. 356.

*Cleaves v. Walsh*, 125 Mich. 638, 84 N. W. 1108, in this case the time to make payment was shortened, but the rule is the same.

<sup>4</sup> See, *Hartman v. McAlister*, 5 N. C. 207.

on particular facts, that, in such cases, the optionor may not terminate the right without previous notice.<sup>5</sup>

SEC. 860. EXTENSION OF TIME TO ELECT. AGREEMENT FOR.—That the optionor during the life of the option conveyed the land to a resident of an adjoining state, did not extend the time for the exercise of the option.<sup>1</sup> An agreement extending time for the payment of an installment of the price, where it is so limited, does not extend the option time.<sup>2</sup> Nor, does an agreement for removal of property of the tenant on the premises, at the termination of the lease.<sup>3</sup>

Where, on the date the option expired, the optionee stated to the optionor that he would take the land but refused to give up the option contract, but stated he would give up the contract if he did not buy within two weeks, the statement of the optionor that he would be back in two weeks (having previously told the optionee that he could not

<sup>5</sup> *Henion v. Bacon*, 91 N. Y. S. 399, 100 App. Div. 99.

As to oral extension being within the Statute of Frauds, see *Sees.* 409, 412, 413.

As to right and power of city to defer its option to purchase franchise, see, *Gathright v. H. M. Byllesby & Co.*, 154 Ky. 106, 157 S. W. 45.

<sup>1</sup> *Merritt v. Joyce*, 117 Minn. 235, 135 N. W. 820.

<sup>2</sup> *Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 P. 519, but it changes the rule as to time being of essence by virtue of express clause to that effect in the original option.

<sup>3</sup> *Bodwell Water Power Co. v. Old Town El. Co.*, 96 Me. 117, 51 Atl. 602, distinguishing *Franklin Land M. & W. Co. v. Card*, 84 Me. 528, 24 Atl. 960, on the ground that in the latter the tenant was authorized to continue in possession till his outlays for improvements were paid.

get the land for less than the price named), is not an extension of the option.<sup>4</sup>

The optionor was a co-tenant in common of the land and gave a written option to purchase within a stated time. Shortly before the expiration of the time, the optionee represented to the optionor that he had decided to take the land on the terms proposed if he would furnish an abstract of title which should be approved by his attorney as showing a perfect title. There was no time after the letter was written to have the abstract made and examined before the option would expire. One of the defendants answered that he had no doubt the title was good, and that he would have the abstract made. It was held the correspondence did not operate to extend the option, and that it did not create a new contract binding upon either party, but amounted to no more than negotiations looking to the future.<sup>5</sup>

SEC. 861. THE SAME. CASES.—Defendants agreed to convey certain land to plaintiffs for a certain price if they desired to purchase after the completion of an oil well on an adjoining tract, the contract to be closed within ten days after acceptance of the option. The well flowed oil May 2, 1906, and on the 3rd, plaintiffs told defendants they would take the land and would close the deal on the 5th of May. They did not do so, and defen-

<sup>4</sup> Cummins v. Beavers, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881, 1 Ann. Cas. 986.

<sup>5</sup> James v. Darby, 100 Fed. 224, 40 C. C. A. 341; see, Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830, election in time, but extension to make survey and furnish abstract of title.



dants notified them that the time would not be extended beyond the 19th, after which the lessees of plaintiffs brought in a valuable oil well thereon, when plaintiffs claimed the right to complete the purchase, and it was held the option expired May 19th, and that performance thereafter could not be compelled.<sup>1</sup>

Where the optionee, within the stipulated time, declines to make the purchase within that time, on account of a mistake in the description of the property and brings suit to reform such description and to enforce the contract as reformed, the court can not, on an amended complaint, extend the time within which plaintiffs may determine whether or not they will elect to accept the property as described in the complaint and decree specific performance against defendants in the event of acceptance.<sup>2</sup>

When the optionor and optionee agreed that unless the latter should, within twenty days, exercise his option for the purchase of the land, he should pay a certain sum in cash "for renewal of said proposition for thirty days," the optionee having failed to exercise the option, or to make the payments specified within twenty days, could not thereafter exercise the option though he offered to do so within the additional thirty days.<sup>3</sup>

An endorsement by a lessor on a lease containing an option to purchase, extending the "within con-

<sup>1</sup> Laughner v. Smith, 232 Ill. 534, 83 N. E. 1052.

<sup>2</sup> Pope v. Hoopes, 90 Fed. 451, 33 C. C. A. 595; see, Hopwood v. McClausland, 120 Iowa 218, 94 N. W. 469; Vassault v. Edwards, 43 Cal. 458; Clarno v. Grayson, 30 Ore. 111, 46 P. 426, 437.

<sup>3</sup> Tevis v. Nugent, 22 Ky. L. Rep. 894, 59 S. E. 9.

tract" until a date named, extends the whole contract, including the option to purchase.<sup>4</sup>

Where an option to purchase is inserted in a lease for one year, with such right of renewal from year to year, not exceeding two years, upon the understanding that the option could be exercised in any year during the tenancy, such option continues under a renewal for the second year, though the option clause is left out of the second lease by agreement, as unnecessary, on the mutual understanding and agreement that the option was extended.<sup>5</sup>

A lease contained an option to purchase at any time during sawing of the timber referred to in the lease, which the lessee was required to saw during the first and second years. The failure of the lessee to saw the required quantity during such time did not operate to extend the option time so as to entitle him to exercise the right of option after the expiration of the second year on the ground that the lumber was not all sawed.<sup>6</sup>

In an action for specific performance, wherein plaintiff vendee testified he offered to perform, if the defendant would stop an adjoining owner from moving buildings off the land, a letter written by defendant after plaintiff's time to perform had expired, in which he asked the plaintiff to see the adjoining owner about the buildings, stating he would have the adjoining owner enjoined if he did not stop, and asking, "How are you coming along

<sup>4</sup> Grummer v. Price, 101 Ark. 611, 143 S. W. 95.

<sup>5</sup> Abbott v. 76 Land Co., 87 Cal. 323, 25 P. 693; under successive leases, Schields v. Horbach, 28 Neb. 359, 44 N. W. 465.

<sup>6</sup> Felton v. Chellis, 81 Vt. 10, 69 Atl. 149.

with your deal?" but making no reference to the contract, did not constitute an extension of the time for plaintiff to perform his part of the contract.<sup>7</sup>

**SEC. 862. TIME AS ESSENCE OF ELECTION.**—At common law, time of performance is always of the essence of a contract, but in equity time is not regarded as of the essence unless the parties express or imply an intent to make it of the essence.<sup>1</sup>

<sup>7</sup> *Peterson v. Rankin*, 161 Iowa 431, 143 N. W. 418.

Where an option is extended on condition that the optionees satisfy the optionor that they can comply with the conditions of the option, the burden of proof is on optionees to show optionor is satisfied. Acts of secretary held not to waive condition on which option was granted, *Washington v. Rosario M. Co.*, 28 Tex. Civ. App. 430, 67 S. W. 459.

Case where extension of time to optionee was held not to affect rights of purchasers from the devisees of the will, the option having been given by the executors, *Trogden v. Williams*, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867.

Contract held sale and not extension, or new option, *Fullenwider v. Rowan*, 136 Ala. 287, 34 So. 975.

Extension to carry out an agreement of sale, held not to convert the agreement into an option, *Standiford v. Kloman*, 234 Pa. 443, 83 Atl. 311; see, also, *Seymour v. Canfield*, 122 Mich. 212, 80 N. W. 1096.

Held option in lease could be exercised at the end of the fixed time or by renewal of the lease at the end of every succeeding year until lease was terminated, *Thomas v. Gottlieb etc. Co.*, 102 Md. 417, 62 Atl. 633.

<sup>1</sup> *Ellis v. Bryant*, 120 Ga. 890, 48 S. E. 352; *Roberts v. Braffett*, 33 Utah 51, 92 P. 789.

*Crawford v. Toogood*, L. R. 13 Ch. Div. 153, holding in order to make time of the essence of a contract after it has been entered into, the time fixed must be reasonable. Lease and option case where, under special circumstances, election was made after option time limit and specific performance decreed; *Pegg v. Wisden*, 16 Beav. 239, 16 Jur. 1105, 51 Eng. Reprint 770.

The decisions concur in holding that in an option contract, because of its one-sided nature, time of election is of the essence in equity as well as at law, whether expressly so stipulated or not,<sup>2</sup> and that, therefore, the failure of the optionee to exercise his right of election and to give notice within the time stipulated in the option, or implied by law, ends his option rights.<sup>3</sup>

<sup>2</sup> *Neeson v. Smith*, 47 Wash. 386, 92 P. 131; *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249, intimates otherwise; *Carter v. Phillips*, 144 Mass. 100, 10 N. E. 500; *Kentucky etc. Co. v. Warwick Co.*, 109 Fed. 280, 48 C. C. A. 363, see, also, decisions in next note; rule as to mining property, see cases in note 6, Sec. 920.

<sup>3</sup> *Martin v. Morgan*, 87 Cal. 203, 25 P. 350, 22 A. S. R. 240; *Commercial Bank v. Weldon*, 148 Cal. 601, 84 P. 171; *Vassault v. Edwards*, 43 Cal. 458; *Magoffin v. Holt*, 62 Ky. (1 Duv.) 95; *Stembridge v. Stembridge*, 87 Ky. 91, 7 S. W. 611, 9 Ky. L. Rep. 948; *Larned v. Wentworth*, 114 Ga. 208, 39 S. E. 855; *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171; *Trogden v. Williams*, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867; *Morton v. Nichols*, 12 Brit. Col. 9; *Wheeling Creek etc. Co. v. Elder*, 170 Fed. 215; *Standiford v. Thompson*, 135 Fed. 991, 68 C. C. A. 425, extension; *Woods v. McGraw*, 127 Fed. 914, 63 C. C. A. 556; *Hollmann v. Conlon*, 143 Mo. 369, 45 S. W. 275; *Dunnaway v. Day*, 163 Mo. 415, 63 S. W. 731; *Estes v. Furlong*, 59 Ill. 298; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853; *Indiana etc. L. Co. v. Pharr*, 82 Ark. 573, 102 S. W. 686; *Swank v. Fretts*, 209 Pa. 625, 59 Atl. 264; *Boston etc. R. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498; *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426; *Lockman v. Anderson*, 116 Iowa 236, 89 N. W. 1072; *Frey v. Camp*, 131 Iowa 109, 107 N. W. 1106; *Kruegel v. Berry*, 75 Tex. 230, 9 S. W. 863; *Grier v. Stewart*, (Tex. Civ. App.) 136 S. W. 1176; *Longworth v. Mitchell*, 26 Ohio St. 334; *Ball v. Canada Co.*, 24 Grant Ch. (U. C.) 281; *Nevitt v. McMurray*, 14 Ont. App. 126; *Bluthenthal v. Atkinson*, 93 Ark. 252, 124 S. W. 510; *Coyle v. Kierski*, (Del. Ch.) 89 Atl. 598; *Jones v. Noble*, 66 Ky. (3 Bush.) 695.

The rule has reference, of course, to the time expressly fixed by the agreement; if no time is expressly fixed, then the right of election runs for a reasonable time, see, *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426, 429.

Courts look upon election as a condition precedent to the vesting of any property right at all in the optionee. The case differs, therefore, from penalties and forfeitures of property rights already acquired, and from timely payment of the price following an election.<sup>4</sup>

- <sup>3</sup> There should, perhaps, be a qualification of the rule of the text when the option is part of a lease or other contract which furnishes the consideration for the option, or where the acts done under the lease are with a view to the exercise of the option. In such cases there is reputable authority that time is not necessarily of the essence. See *Schroeder v. Gemeinder*, 10 Nev. 355; *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25. See note 2, Sec. 864; note 3, Sec. 868.
- <sup>4</sup> *Steele v. Bond*, 32 Minn. 14, 18 N. W. 830; and according to this decision the fact that the optionee paid a large sum as consideration for the option is, therefore, immaterial. In this case, which was an option in a lease of the premises, the price was \$11,500 and the consideration paid for the option privilege to purchase was \$3000. The court viewed the option privilege as an entirely independent transaction, and strictly held to the general rule that the optionee could not be helped out for his failure to pay in time because the rule as to forfeiture did not apply. A different, and in the author's opinion a better view is taken in the cases cited in note 3, *supra*, and besides where, as in the Minnesota case, so large a sum is paid for the option, it would seem more equitable to hold that the effect is to vest in the optionee an equitable estate. See *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426, 429-30; *Ely v. Beaumont*, 5 S. & R. (Pa.) 124; but as to the general rule, see, *Davis v. Thomas*, 1 Russ & M. 506, 39 Eng. Reprint 195; *I. X. L. etc. House v. Berets*, 32 Utah 454, 91 P. 279; *McCauley v. Coe*, 150 Ill. 311, 37 N. E. 232, 234; *Lockman v. Anderson*, 116 Iowa 236, 89 N. W. 1072; *L'Engle v. Overton*, 61 Fla. 653, 53 So. 381; *Nelson v. Stephens*, 107 Wis. 136, 82 N. W. 163; *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853, 859; *Bluthenthal v. Atkinson*, 93 Ark. 252, 124 S. W. 510.

Same rule applies to option to repurchase, see *Jeffreys v. Charlton*, 72 N. J. Eq. 340, 65 Atl. 711.

Essence clause in lease with option held to apply to option, *Snider v. Yarbrough*, 43 Mont. 203, 115 P. 411.

An option to purchase differs materially from a condition subsequent capable of working a forfeiture to the optionor, *Woodall v. Bruen*, (W. Va.) 85 S. E. 170.

In option contracts, courts view any delay in election, beyond the fixed option time, with strictness, since, as it is said, it is optional with the optionee whether or not he will elect, and that, in the meantime, the optionor is bound.<sup>5</sup>

But as pointed out in the following sections, the general rule is subject to the qualification that courts of equity may and do grant relief to an optionee in default in cases where the delay or failure is attributable to inequitable conduct on the part of the optionor, amounting to estoppel,<sup>6</sup> or where there is mistake, or some other equitable ground for invoking its jurisdiction,<sup>7</sup> or where there has been providential intervention.<sup>8</sup>

**SEC. 863. ELECTION. EQUITABLE RELIEF TO OPTIONEE. GENERALLY.**—In the preceding sections of this chapter, we have endeavored to present the rules of law necessary to be observed by an optionee desiring, by election, to turn his option into a binding promise on the part of the optionor. These general rules can be summarized as follows: the election must be timely, that is, it must be made within the contract time if expressed, or otherwise within a reasonable time; it must be made by the optionee and communicated

<sup>5</sup> *Jones v. Monerief-Cook Co.*, 25 Okl. 856, 108 P. 403; *Meidling v. Trefz*, 48 N. J. Eq. 638, 23 Atl. 824; *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687.

<sup>6</sup> See Secs. 866, 869.

<sup>7</sup> *Ellis v. Bryant*, 120 Ga. 890, 48 S. E. 352, payment being the act of election; *Wilkins v. Evans*, 1 Del. Ch. 156; *Usher v. Livermore*, 2 Iowa 117; *Taylor v. Longworth*, 14 Pet. (U. S.) 172, 10 L. Ed. 405; *Steele v. Bond*, 32 Minn. 14, 18 N. W. 830.

<sup>8</sup> See Sec. 864.

to the optionor in the mode and at the place expressed in the contract or implied by law; and it must be unconditional, meaning by this that the election must be upon the exact terms and conditions of the option. To these must be added the rule that the failure of the optionee to meet these requirements, works an end to his option rights. But this last rule is based on the assumption that the failure of the optionee was due to his own neglect or fault and was not brought about by conduct of the optionor, nor caused by circumstances and events beyond the control of the optionee.

It becomes necessary now to present the view that these rules, the strict enforcement of which was so much insisted upon by the early decisions, are, nevertheless, subject to, and qualified by, certain other overruling equitable rules, in accordance with which courts of equity grant relief in cases involving fraud or mistake and likewise, under special circumstances, where performance is prevented by accident, and also enforce the rule of estoppel where the conduct of the optionor has been such as to make that rule applicable.<sup>1</sup> With reference to accident and act of God, it would seem, on principle, that equity has no jurisdiction to extend the time so as to cover an overtime election, except the facts and circumstances are such as to make a case upon some other equitable ground within its juris-

<sup>1</sup> In cases where the conduct of the optionor is not involved, there is no equitable ground upon which to base waiver or estoppel since the act of election or other collateral condition, the performance of which is a condition precedent to election, is necessary to raise the bilateral contract, and the rule with reference to forfeiture, applicable to bilateral contracts, can not be invoked, except upon the ground of fraud or mistake. Equity can not extend the time for election. See, *Briles v. Paulson*, (Cal.) 149 P. 169.

diction, but as will be seen in the following sections, there are a few cases where it would seem, courts have granted relief for pure accident and sometimes for providential interference.

SEC. 864. ELECTION. EQUITABLE RELIEF. ACCIDENT AND ACT OF GOD.—Death of the optionor and refusal of the administrator to receive the purchase money and non-residence of some and infancy of other heirs, excuse a delay of twenty-one days in electing and giving notice.<sup>1</sup> So, where the lessee was prevented from giving notice of renewal of a lease within the prescribed time, because of an accidental injury received by him, he having served notice at the earliest opportunity and the lessor having suffered no loss from the delay. Specific performance of a covenant for renewal of the lease was granted notwithstanding time was of the essence.<sup>2</sup>

<sup>1</sup> Page v. Hughes, 41 Ky. (2 B. Mon.) 439. The court quoting Lord Thurlow, said: "Accident or misfortune which the [lessee] could not prevent and by means of which he was disabled from applying for the renewal at the stated time, according to the lease" saved the forfeiture and entitled him to specific execution and that this seemed to be perfectly consistent with the "philosophy and harmony of equity jurisprudence."

<sup>2</sup> Monihon v. Wakelin, 6 Ariz. 225, 56 P. 735. This case, like some others (see note 3, Sec. 862), views an option in a lease as a real contract, and therefore, not governed strictly by the rules applicable to pure options, and holds that though time was of the essence, equity would, under the circumstances, permit the lessee to make his election after the expiration of the fixed contract time.

In Usher v. Livermore, 2 Iowa 117, it is said that time may be made of the essence of a contract, but in equity, when the precise time has been omitted by accident, chance or misfortune, and the party has shown himself ready, and desirous of performing at the earliest day, under the circumstances, the precise time is not vital.



In a North Carolina case it is said that if the parties agree upon a day of performance, in the absence of waiver, or those providential interventions recognized as sufficient to relieve them from strict performance, the courts are not permitted to do so.<sup>3</sup> It is held, under the Louisiana Code, that when an obligation is to come into existence only in case a certain thing is done within a certain time, and it is not done within that time, no obligation arises, and that, except for the acts of the obligee, it is immaterial what was the cause of the thing not having been done, specially mentioning the acts of third persons and *vis major*, as not exceptions.<sup>4</sup>

SEC. 865. ELECTION. EQUITABLE RELIEF. MISTAKE.—A lessee supposing he had the option until the 24th of March, 1887, applied to the assignee of the lessor's interest, prior to March 1, 1887 (the last day of the option time), to have the option extended for two years. The assignee agreed to give him an answer on March 7, 1887, at which time he informed the lessee that the option would not be extended, but promised to have the deed ready on March 24, 1887. On that day the lessee tendered the amount stipulated in the lease as the price. The court remarking that there was no doubt the parties understood, intended and believed that the option time expired on the 24th of March, held that on the facts, the

<sup>3</sup> Hardy v. Ward, 150 N. C. 385, 64 S. E. 171, 176.

<sup>4</sup> Jennings etc. Synd. v. Oil Co., 119 La. 793, 44 So. 481.

lessee was entitled to specific performance.<sup>1</sup> But it would be held otherwise where the optionor, without intent to deceive, stated to the optionee the wrong date, it not appearing that the optionee asked for an inspection of the option and did not make any effort to ascertain the date.<sup>2</sup>

SEC. 866. ELECTION. EQUITABLE RELIEF. MISCELLANEOUS CASES GRANTING RELIEF.—In a case involving a lease and option to purchase, the lessee entered with a view of purchasing and made improvements, but was unable to make payment of the price until a few days after it was due, the lessor having gone away, but did make tender and a demand for a deed upon the lessor's return, ten days later, which was refused. The court granted specific performance.<sup>1</sup>

Where the failure of a tenant to appoint an appraiser, within the time stipulated, to fix the value of the premises as the basis for renewal, was not wilful and it did not appear that any new rights had intervened, or that the position of the parties had been changed by the delay in the appointment of appraisers, or that damage would result, while if relief was refused the tenant would lose a valu-

<sup>1</sup> Keyport Brick & T. Mfg. Co. v. Lorillard, (N. J. Eq.) 19 Atl. 381, affirmed 48 N. J. Eq. 295, 22 Atl. 203.

<sup>2</sup> McKenzie v. Murphy, 31 Colo. 274, 72 P. 1075.

Mere inadvertence is not sufficient to excuse delay, I. X. L. etc. House v. Berets, 32 Utah 454, 91 P. 279.

<sup>1</sup> Wilson v. Herbert, 76 Md. 489, 25 Atl. 685.

Case where part of price paid within time (payment being election) and balance delayed until after expiration of option time owing to objection by optionor to statement of accounts, Wilkins v. Evans, 1 Del. Ch. 156.

able building, equity will excuse the delay and grant specific performance of the covenant to renew.<sup>2</sup>

The grantor of an option who prevents its exercise within the time specified in the grant, can not take advantage of the failure to exercise it in due time, but must give a reasonable time therefor after the obstruction he interposed is removed.<sup>3</sup>

SEC. 867. ELECTION. EQUITABLE RELIEF. MISCELLANEOUS CASES DENYING RELIEF.—A tenant occupied premises for business purposes for nearly ten years under a lease with covenant for an extension of the lease, on written notice, at a day fixed, and had spent a large sum in fitting the premises for his business, and had built up a valuable business, and was unexpectedly in a foreign country on the day he was required to give notice of his intention to renew, but gave notice eighteen days thereafter, immediately upon his return from abroad, and the court held that equity could give him no relief as the notice of renewal was a condition precedent. It appeared, however, that the lessee had the right to give notice at any time during the ten year term.<sup>1</sup>

Where the optionee gave notice of election by letter through the mail, and the letter was not received by the optionor, the failure to get the notice to the optionor in time, is not one that a court of equity will correct, where the contract did

<sup>2</sup> *Simon v. Schmitt*, 118 N. Y. S. 326.

<sup>3</sup> *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 58 C. C. A. 79.

<sup>1</sup> *Doepfner v. Bowers*, 106 N. Y. S. 932.

not require notice by mail, and it could have been given personally to the optionor.<sup>2</sup>

SEC. 868. ELECTION. WAIVER AND ESTOPPEL.—The fundamental conception of waiver is some act by one of the parties to the contract sufficient to excuse performance by the other party of some one or more of the stipulations of the contract on his part.<sup>1</sup> It is a well settled principle in the law of options that unless the optionee timely exercises his right of election in the mode and in accordance with the terms of the option and gives timely notice thereof to the optionor, his option rights are at an end. Since waiver can only arise, so to speak, from conduct, is it possible that the conduct of the optionor may be such as to dispense with election? There may be conduct on the part of the optionor which will waive a timely exercise of the option right and notice thereof, or an insufficient or a conditional election, or a formal notice, but it is not believed that conduct on the part of the optionor, short of estoppel, can entirely dispense with an election of some kind brought to the knowledge of the optionor.<sup>2</sup>

<sup>2</sup> *Bluthenthal v. Atkinson*, 93 Ark. 252, 124 S. W. 510.

<sup>1</sup> Acts and conduct of third parties will not work waiver or estoppel, *Bradley v. Bradley*, 14 Ont. L. Rep. 473, 10 Ont. Wkly. Rep. 223.

Vendee of lessor who is not a party to the lease-option contract, can not, by recognizing the lease after his purchase, render the lease effective so as to make an obligation contained therein binding on the vendor, *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571.

<sup>2</sup> See *Kelsey v. Crowther*, 162 U. S. 404, 40 L. Ed. 1017, 16 S. Ct. 808; *Abbott v. 76 Land Co.*, 101 Cal. 567, 53 P. 445; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; *Borst v. Simpson*, 90 Ala. 373, 7 So. 814; *Mason v. Payne*, 47 Mo. 517; *Byers v. Denver C. R. Co.*,

Before an agreement of sale can arise out of an option contract there must be an act of some kind, at some time, on the part of the optionee, evidencing his intention to exercise the option. Waiver will not, and can not, supply this necessary act on the part of the optionee unless there is involved in such conduct, constituting waiver, an act evidencing an intention to elect, or, unless the conduct on the part of the optionor is such as to estop him.<sup>3</sup>

13 Colo. 552, 22 P. 951, 953; see, *Pegg v. Wisden*, 16 Beav. 239, 16 Jur. 1105, 51 Eng. Reprint 770.

<sup>2</sup> Election varying from terms of option, see *McCowen v. Pew*, 18 Cal. App. 302, 123 P. 191, 199.

As to fraud etc., see *Cusack v. Gunning System*, 109 Ill. App. 588, extension of lease.

Conspiracy to prevent election, *Breyfogle v. Walsh*, 80 Fed. 172, 25 C. C. A. 357; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

Of course, if the option contemplates the doing or performance of some act by the optionee as consideration for the option, the performance of the act, in itself, may constitute an election, without notice to the optionor. This, however, is by force of the agreement, see *Goldberg v. Drake*, 145 Mich. 50, 108 N. W. 367, acceptance of option written thereon in absence of optionor, see, also, *McCarty v. Helbing*, (Ore.) 144 P. 499.

Under a "refusal" the election is not waived, the time being controlled by the acts of the optionor, *Cummings v. Nielson*, 42 Utah 157, 129 P. 619.

There can be no waiver of acceptance of a mere offer. See *Tilton v. Sterling*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689; *Marsh v. Lott*, 8 Cal. App. 384, 97 P. 163.

<sup>3</sup> See, *Raddatz v. Florence Inv. Co.*, 147 Wis. 636, 133 N. W. 1100, where payment was the act of election but was not in time the court saved the right of the lessee-optionee, because of the conduct of the lessor, placing its decision on the rule as to forfeiture. See, also, *Scott v. Hubbard*, 67 Ore. 498, 136 P. 653; *Tilton v. Sterling C. & C. Co.*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689; *Merritt v. Joyce*, 117 Minn. 235, 135 N. W. 820.

The distinction between a bare election and notice, and election consisting of payment, or involving payment of the price should be kept in mind. Thus, in a deed granting land on condition that the

**SEC. 869. WAIVER AND ESTOPPEL. CASES HOLDING ACTS CONSTITUTE WAIVER.—**

Where a lessee, in a lease containing an option to purchase, was ignorant of his rights and relied on the lessor's agents to apprise him of his obligations as they arose, and upon such reliance made improvements, and the lessor treated him as having elected to purchase, it was held the lessee had sufficiently elected to purchase.<sup>1</sup>

Where the lessee holds over and pays rent, under a lease giving him the option to renew, on notice, prior to expiration of the term, notice is waived.<sup>2</sup>

When, by the terms of the option, the optionee was to send written notice of election and he sent such notice by an agent who read it to the optionor and notified him that it would be served upon him the date fixed by the option, a statement by the optionor that he would not accept the notice and

estate conveyed shall not vest until and unless a certain payment shall be made on or before a certain time, payment is in pursuance of a contract already made and, therefore, the absolute refusal of the grantor to perform before the time fixed for payment, would be a waiver of a timely payment or tender. If, on the other hand, the transaction should be construed to be an option and the payment the act of election, no contract could arise without an election, see *Borst v. Simpson*, 90 Ala. 373, 7 So. 814; *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12, 63 A. S. R. 193.

<sup>3</sup> As to oral extension and waiver see Sec. 413 and note.

<sup>1</sup> *Raddatz v. Florence Inv. Co.*, 147 Wis. 636, 133 N. W. 1100; *Andrews v. Marshall Creamery Co.*, 118 Iowa 595, 92 N. W. 706, 60 L. R. A. 399, 96 A. S. R. 412; *Bullock v. Cutting*, 140 N. Y. S. 686, notice in the alternative, no objection being made by optionor.

<sup>2</sup> *Kean v. Story & Clark Piano Co.*, 121 Minn. 198, 140 N. W. 1031; *Sanders v. Middleton*, 112 Me. 433, 92 Atl. 488; *Remm v. Landon*, 43 Ind. App. 91, 86 N. E. 973; *Quinn v. Valiquette*, 80 Vt. 434, 68 Atl. 515; see *Bockmann v. Davis*, 172 Ill. App. 505.

that he intended to keep the coal covered by the option, was a waiver of further notice.<sup>3</sup>

An optionor who agrees to extend the time limit of the option and then puts the optionee off his guard, will be estopped from taking advantage of an election within the time limit first agreed upon, and the optionee will have the extended time within which to elect.<sup>4</sup>

So, when the optionor evades tender, or causes the optionee to be misled as to his rights,<sup>5</sup> or deals with the optionee after the expiration of the option time,<sup>6</sup> or treats and recognizes the election as sufficient.<sup>7</sup>

Where a deed provides for a repurchase of the property by the grantor within two years, the option to repurchase survives after such time when the grantee receives remittances on the investment,

<sup>3</sup> *Jones v. Sowers*, 204 Pa. 329, 54 Atl. 169, in this case it will be observed there was in effect a timely oral election, but it was not in writing as required. The refusal waived the formal written notice, the court holding that written notice could be waived by parol.

<sup>4</sup> *Longfellow v. Moore*, 102 Ill. 289.

<sup>5</sup> *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228; *Guilford v. Mason*, 22 R. I. 422, 48 Atl. 336; *L'Engle v. Overstreet*, 61 Fla. 653, 55 So. 381; *Cook v. Jones*, 96 Ky. 283, 28 S. W. 960, 16 Ky. L. Rep. 469.

Oral agreement fixing time and place of election and failure of optionor to keep appointment, *Fletcher v. Painter*, 81 Kan. 195, 105 P. 500.

<sup>6</sup> *McCarty v. Helbling*, (Ore.) 144 P. 499; *Lester v. Hutson*, (Tex. Civ. App.) 167 S. W. 321; *Morrell v. Studd*, 83 L. J. Ch. 114 (1913), 2 Ch. 648, 109 L. T. 628.

<sup>7</sup> *McCowen v. Pew*, 18 Cal. App. 302, 123 P. 191, 199, it was claimed the election was conditional; see, also, *Cates v. McNeil*, (Cal.) 147 P. 944, holding failure of optionor to object to alleged conditional election, was waiver; also, *Cape Fear L. Co. v. Small*, 84 S. C. 434, 66 S. E. 880.

though at a lower per cent than provided in the deed.<sup>8</sup>

SEC. 870. WAIVER AND ESTOPPEL. CASES HOLDING ACTS NOT WAIVER.—Notice by a lessor (the lease containing an option to purchase) prior to the expiration of the time limit, that he would not convey, does not excuse an election and notice by the optionee. The court said that until “acceptance” of the option, no contract of purchase existed, nor any obligation on the part of the optionor to convey.<sup>1</sup>

So, the failure of the optionor (of land) to tender an abstract of title as he agreed to do, does not relieve the optionee from the necessity of election and notice within the time limit. The court said the election or offer to perform was a condition precedent to the optionee’s right to specific performance.<sup>2</sup>

The fact that the optionor, after the expiration of the time limit of the option, expressed a willingness to perform, does not amount to a waiver.<sup>3</sup> Nor

<sup>8</sup> Connolly v. Keenan, 87 N. Y. S. 630, 42 Misc. R. 589.

<sup>1</sup> Tilton v. Sterling C. Co., 28 Utah 173, 77 P. 758, 107 A. S. R. 689; also, Abbott v. 76 Land Co., 101 Cal. 567, 53 P. 445.

<sup>2</sup> Kelsey v. Crowther, 162 U. S. 404, 40 L. Ed. 1017, 16 S. Ct. 808, affirming s. c. 7 Utah 519, 27 P. 695, and lays down the rule that a default or failure of the optionor does not excuse an election by the optionee; Hessel v. Neal, 25 Colo. App. 300, 137 P. 72; Brooke v. Garrod, 3 Kay. & J. 608, 2 DeG. & J. 66, 69 Eng. Reprint 1252; see Crawford v. Toogood, L. R. 13 Ch. Div. 153.

<sup>3</sup> Codding v. Wamsley, 4 N. Y. Sup. Ct. Rep. (4 Tomp. & C.) 49, 1 Hun. 585.



does the fact that the optionor served notice of forfeiture after breach on the part of the optionee.<sup>4</sup>

Failure of the lessor to mention the non-receipt of notice of renewal of the lease after the expiration of the term, when approached by the optionee with reference to repairs, does not constitute waiver of notice of renewal.<sup>5</sup>

**SEC. 871. EFFECT OF SUFFICIENT OR INSUFFICIENT ELECTION.**—The effect of a sufficient and timely election and notice is to convert the option into a binding promise on the part of the optionor to convey, and this results whether or not the option contract is supported by a consideration.<sup>1</sup>

<sup>4</sup> *Low v. Young*, 158 Iowa 15, 138 N. W. 828; or failed to object until advised of this right under the option, *Neill v. Hitchman*, 201 Pa. 207, 50 Atl. 987.

<sup>5</sup> *Bluthenthal v. Atkinson*, 93 Ark. 252, 124 S. W. 510.

To amount to waiver of tender of return of share of stock to seller there must be a distinct and absolute refusal to perform and it must be so treated by the adverse party, *Alexander v. Bosworth*, (Cal. App.) 147 P. 607.

<sup>1</sup> See, *Linn v. McLean*, 80 Ala. 360; *Smith v. Post*, 167 Cal. 69, 138 P. 705; *Walter G. Reese Co. v. House*, 162 Cal. 740, 124 P. 442; *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; *McCowen v. Pew*, 18 Cal. App. 302, 123 P. 191; *Rheingans v. Smith*, 161 Cal. 362, 119 P. 494, Ann. Cas. 1913B, 1140; *Vassault v. Edwards*, 43 Cal. 458; *Copp v. Longstreet*, 5 Colo. App. 282, 38 P. 601, option is merged into contract of sale and purchase; *Nutmeg etc. Corp. v. Fiske*, 81 Conn. 463, 71 Atl. 499, renewal of lease; *South Florida etc. Co. v. Walden*, 59 Fla. 606, 51 So. 554; *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541; *Carter v. Love*, 206 Ill. 310, 69 N. E. 85; *Perkins v. Hadsell*, 50 Ill. 216; *Rampton v. Dobson*, 156 Iowa 315, 136 N. W. 682; *McFarland v. McCormick*, 114 Iowa 368, 86 N. W. 369; *Goodpaster v. Porter*, 11 Iowa 161; *King v. Raab*, 123 Iowa 632, 99 N. W. 306, lease and option; *Chadsey v. Condley*, 62 Kan. 853, 62 P. 663; *Murphy T. & Co. v. Reid*, 125 Ky. 585, 101 S. W. 964, 31 Ky. L. Rep. 176, 10 L. R. A. (N. S.) 195; *Green etc. Min. Co. v. Brown*,

If the election is one which in form meets the requirements of the Statute of Frauds, then, it would seem, that by such an election the option is turned into an executory contract with mutual obligations on the parties as in other bilateral contracts.<sup>2</sup>

Under an option to purchase, the effect of lack of sufficient or timely election and notice is to end the option rights of both parties under the option.<sup>3</sup>

140 Ky. 332, 131 S. W. 13, mining privileges; *Thomas v. Gottlieb etc. Co.*, 102 Md. 417, 62 Atl. 633; *Boston etc. R. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498; *Gustin v. Union School Dist.*, 94 Mich. 502, 54 N. W. 156, 34 A. S. R. 361; *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 A. S. R. 341; *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; *Raiche v. Morrison*, 47 Mont. 127, 130 P. 1074; *Donahue v. Potter etc. Co.*, 63 Neb. 128, 88 N. W. 171; *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 932; *Brooks v. Wentz*, 61 N. J. Eq. 474, 49 Atl. 147; *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53; *Benedict v. Pincus*, 191 N. Y. 377, 84 N. E. 284; *Paddock v. Davenport*, 107 N. C. 710, 12 S. E. 464; *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637; *Friendly v. Elwert*, 57 Ore. 599, 105 P. 404, 112 P. 1085, Ann. Cas. 1913A, 357; *Penn Min. Co. v. Martin*, 210 Pa. 53, 59 Atl. 436; *Penn Min. Co. v. Smith*, 210 Pa. 49, 59 Atl. 316; *Boyer v. Nesbitt*, 227 Pa. 398, 76 Atl. 103; *Fessler's Appeal*, 75 Pa. 483, 499; *Newell's Appeal*, 100 Pa. 513; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195; *Witherspoon v. Staley*, (Tex. Civ. App.) 156 S. W. 557; *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249; *Cheney v. Cook*, 7 Wis. 413; *Frank v. Stratford-Hancock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *Castle Creek W. Co. v. City of Aspen*, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660; *Johnston v. Trippe*, 33 Fed. 530; *Couch v. McCoy*, 138 Fed. 696; *Brown v. Slee*, 103 U. S. 828, 26 L. Ed. 618; *Minneapolis etc. Ry. Co. v. Columbus etc. Co.*, 119 U. S. 149, 30 L. Ed. 376, 7 S. Ct. 168; *Willard v. Tayloe*, 8 Wall. (U. S.) 557, 19 L. Ed. 501.

<sup>2</sup> Secs. 416, 417.

<sup>3</sup> *Harper v. Independence Dev. Co.*, 13 Ariz. 176, 108 P. 701; *Indiana etc. L. Co. v. Pharr*, 82 Ark. 573, 102 S. W. 686; *Larned v. Wentworth*, 114 Ga. 208, 39 S. E. 855; *Sutherland v. Parkins*, 75 Ill. 338; *Spafford v. Hedges*, 231 Ill. 140, 83 N. E. 129; *Bashor v. Cady*, 2 Ind. 582; *O'Neill v. Risinger*, 77 Kan. 63, 93 P. 340, oil and gas

However, if the option is one of sale and return the effect is directly the opposite: the sale is completed as a general rule by failure to elect to return in time.<sup>4</sup>

An election once made can not be withdrawn by the optionee<sup>5</sup> unless, of course, the optionor refuses to perform or otherwise breaches the contract.<sup>6</sup>

The primary obligation on the part of the optionor upon proper and timely election, is to

option; *Stembridge v. Stembridge*, 87 Ky. 91, 7 S. W. 611, 9 Ky. L. Rep. 948; *Noe v. Saylor*, 143 Ky. 254, 136 S. W. 209; *Jennings etc. Syndicate v. Oil Co.*, 119 La. 793, 44 So. 481; *Cameron v. Shumway*, 149 Mich. 634, 113 N. W. 287, extension; *Hollmann v. Conlon*, 143 Mo. 369, 45 S. W. 275; *Watkins v. Youll*, 70 Neb. 81, 96 N. W. 1042; *Jeffreys v. Charlton*, 72 N. J. Eq. 340, 65 Atl. 711; *Page v. Shainwald*, 169 N. Y. 246, 62 N. E. 356, return; *Atlantic Product Co. v. Dunn*, 142 N. C. 471, 55 S. E. 299, lease and option; *Barnes v. Rea*, 219 Pa. 279, 68 Atl. 836; *Connor v. Renneker*, 25 S. C. 514; *Kruegel v. Berry*, 75 Tex. 230, 9 S. W. 863; *Tilton v. Sterling C. Co.*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689; *Haskins v. Dern*, 19 Utah 89, 56 P. 953; *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830; *Cummings v. Town of Lake Realty Co.*, 86 Wis. 382, 57 N. W. 43; *Richardson v. Hardwick*, 106 U. S. 252, 27 L. Ed. 145, 1 S. Ct. 213; *McConkey v. Peach etc. Co.*, 68 Fed. 830, 16 C. C. A. 8, affirmed, 161 U. S. 500, 40 L. Ed. 786, 16 S. Ct. 640, does not bind optionor to sell; *Ranelagh v. Melton*, 34 L. J. Ch. 227, 11 L. T. Rep. 409, 13 Wkly. Rep. 150, 62 Eng. Reprint 627.

<sup>3</sup> Where, after defendant's inability to perform a contract to buy land, he was given a lease and option to purchase, his failure to exercise such option terminated all his right to the land, *Stone v. Powell*, (Iowa) 150 N. W. 15.

<sup>4</sup> *Guss v. Nelson*, 200 U. S. 298, 50 L. Ed. 489, 26 S. Ct. 260, affirmed, s. c. 14 Okl. 296, 78 P. 170; see Secs. 828, 830, 853.

<sup>5</sup> *Burner v. Burner*, 115 W. Va. 484, 79 S. E. 1050; *Linn v. McLean*, 80 Ala. 360, deposit in post-office; *Collins v. Whigham*, 58 Ala. 438; *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219, 69 P. 176, failure of water supply after election; *Castle Creek W. Co. v. City of Aspen*, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660, estoppel to choose another alternative optional provision; withdrawal by one of several optionees, *Burton v. Shotwell*, 76 Ky. 271.

<sup>6</sup> *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485.

convey the property and to perform the agreement on his part with reference to the conveyance of the title, which usually, in addition to a deed of conveyance, consists of the furnishing of an abstract or certificate of title, removal of encumbrances, giving possession, etc. These subjects as far as they relate to the option agreement, will be presented later on.

The obligation on the part of the optionee is to pay the price in accordance with the terms of the agreement, a subject which will be treated in the next chapter.

SEC. 872. SAME. MISCELLANEOUS CASES.—The decisions cited in the notes to the next preceding section do not disclose any facts justifying an extended presentation. They all hold to the rules announced. There are a few decisions, however, exhibiting facts to which attention should be called.

When the option is without time limit, upon the expiration of a reasonable time, it may be revoked, and a sale thereafter of the stock by the optionor, at an advanced price, gives the optionee no interest therein.<sup>1</sup>

Upon election to renew a lease on the same terms, the lessee holds under the original lease and not under the notice, as the effect of the notice is merely to extend the term of the original lease.<sup>2</sup>

Upon exercise of his option, the optionee becomes the equitable owner of the land and the optionor

<sup>1</sup> *Rees v. Pellow*, 97 Fed. 167, 38 C. C. A. 94.

<sup>2</sup> *Wiener v. Graff & Co.*, 7 Cal. App. 580, 95 P. 167; *Bettens v. Hoover*, 12 Cal. App. 313, 107 P. 329; see Secs. 831, 834.

the equitable owner of the purchase money.<sup>3</sup> This is in accordance with the general rule relating to agreements of sale and purchase. Prior to election, however, the optionee is not an equitable owner within the rule.<sup>4</sup> When an option is contained in the lease, an election to purchase under the option and tender, ends the lease and the rent thereunder.<sup>5</sup>

A mining agreement providing for the payment of the price in installments is not a continuing offer as each payment is made, but on the first payment, it becomes a contract of sale.<sup>6</sup> The optionee is not entitled to possession of the property in the absence of an express stipulation to that effect, at least until he makes tender and demands deed.<sup>7</sup>

Due and timely exercise of the option cuts off the right of the wife of the optionor to declare a homestead on the land, and separate property of her husband (optionor), with knowledge of a prior option agreement for its sale by her husband, and it is immaterial whether the optionee exercised his option to purchase before or after the declaration of homestead was filed for record.<sup>8</sup>

<sup>3</sup> *Waters v. Bew*, 52 N. J. Eq. 787, 29 Atl. 590.

Relation of vendor and vendee does not arise until election. *Waterman v. Banks*, 144 U. S. 394, 36 L. Ed. 479, 12 S. Ct. 646; see Sec. 514.

<sup>4</sup> See Sec. 502.

<sup>5</sup> See Sec. 519.

<sup>6</sup> *Reed v. Hickey*, 13 Cal. App. 136, 109 P. 38; see *Obery v. Lander*, 179 Mass. 125, 60 N. E. 378, payment of installment of price on three lots of stock.

<sup>7</sup> *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497; see Sec. 513.

<sup>8</sup> *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522.

The doctrine of forfeiture peculiar to land contracts has no application to an option not raised to a bilateral contract by election. Upon its expiration without election, the option is at an end. There is nothing to forfeit at the time election is due to be made,<sup>9</sup> and an expired option contract can not be revived except upon proof of a new contract.<sup>10</sup>

<sup>9</sup> Election is a condition precedent; no estate can vest if not made; it is not a condition subsequent, *Bluthenthal v. Atkinson*, 93 Ark. 252, 124 S. W. 510, 512.

Payments made by optionee are forfeited to optionor, even without notice, *Commercial Bank v. Weldon*, 148 Cal. 601, 84 P. 171.

Where the optionee failed timely to elect he can not claim that the optionor breached the agreement by his inability to give a fee, simple title, the optionor having only a bond for title, *Kingsley v. Kressly*, 60 Ore. 167, 118 P. 678, Ann. Cas. 1913E, 746.

<sup>10</sup> *Page v. Shainwald*, 169 N. Y. 246, 62 N. E. 356.

## CHAPTER IX.

### PAYMENT AND TENDER.

- Sec. 901. Generally.
- Sec. 902. By whom payment or tender may be made.
- Sec. 903. To whom payment or tender may be made.
- Sec. 904. Place of payment or tender.
- Sec. 905. Place of payment or tender, continued.
- Sec. 906. Sufficiency of tender.
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- Sec. 911. Amount of payment or tender under arbitration and valuation clauses.
- Sec. 912. Failure to object as waiver of form, mode and amount.
- Sec. 913. Time of payment. Generally. (Fixed time.)
- Sec. 914. Time of payment. Payment as election distinguished from payment as performance.
- Sec. 915. Same. Cases holding payment not necessary to election.
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- Sec. 921. Same. Delivery of deed and payment of price as concurrent acts.
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- Sec. 923. Time of payment. Waiver and estoppel. Generally.
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- Sec. 927. Time of payment. Waiver. Nature and essentials of acts to constitute.
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- Sec. 930. Time of payment. Waiver and estoppel. Refusal and repudiation by optionor. Generally.
- Sec. 931. Time of payment. Waiver by accepting past due payments.
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- Sec. 933. Time of payment. Waiver and estoppel. Evasion by optionor and absence.
- Sec. 934. Time of payment. Waiver arising under options like "first refusals."
- Sec. 935. Time of payment. Waiver by one joint optionor.
- Sec. 936. Time of payment. Waiver. Effect of encumbrances, dower right, etc.
- Sec. 937. Time of payment. Death of optionor.
- Sec. 938. Time of payment. Accident and mistake.
- Sec. 939. Time of payment. Waiver under agreement for extension.
- Sec. 940. Time of payment. Waiver. Effect of possession and improvements by optionee.
- Sec. 941. Time of payment. Waiver. Effect of part performance.
- Sec. 942. Time of payment. Tender in pleadings and miscellaneous cases.
- Sec. 943. Effect of payment or tender.



SECTION 901. GENERALLY.—An option contract is brought into legal existence by an offer of one person to sell an option privilege on property, to another, and the acceptance of that offer, by the latter, there being a consideration to support the contract. The option is raised to a binding promise on the part of the optionor to sell, by a timely and proper exercise of the option privilege to purchase. The next and usually the final, but necessary step in the perfection of the optionee's right to enforce the contract thus raised is payment or tender of the purchase price of the property.<sup>1</sup> These subjects, except the last, have been presented in preceding chapters and we are now brought to a consideration of this last step, one which involves the person by whom and to whom payment or tender may be made, the amount of payment or tender, and the place where and the time when it must be made. To this must be added the very important subjects of waiver and estoppel, and reference must be made again to the distinction between payment as an act of election necessary to turn the option into a binding promise, and payment as an act in the performance of the contract thus raised.

SEC. 902. BY WHOM PAYMENT OR TENDER MAY BE MADE.—Payment or tender may be made by the optionee himself, by any person

<sup>1</sup> Deitz v. Stephenson, 51 Ore. 596, 95 P. 803.

Thomas v. Kelly, 3 S. C. (3 Rich.) 210, 16 Am. Rep. 716, case where optionee under will failed to pay the appraised value of the plantation.

authorized by him,<sup>1</sup> by his assignee,<sup>2</sup> or by any other person who has assumed the obligation of making payment.<sup>3</sup> It may also be made by the personal representative of the deceased optionee.<sup>4</sup> The right of a joint tenant or of a tenant in common to make payment and tender on behalf of all the other tenants must be determined from the terms of the contract between them. Under an ordinary bilateral contract where the several tenants are bound to make payment, the rule is, that any one of the several co-tenants may make payment or tender on behalf of all.<sup>5</sup> Under an option contract, if the election has already been timely and properly made so as to bind all of the tenants to perform, it would seem that any one of the tenants may make payment or tender on behalf of all. Where election has not been made by all the tenants, or where payment

<sup>1</sup> It may not be made by a stranger unless at the time the optionor is informed on whose behalf the tender is made, *Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571.

Tender is good though not stated whether it is made by the debtor, his purchaser, or agent, *Johnston v. Gray*, 16 Serg. & R. (Pa.) 361, 16 Am. Dec. 577; *Wyllie v. Matthews*, 60 Iowa 187, 14 N. W. 232; *Keystone L. etc. Co. v. Jenkinson*, 69 Mich. 220, 37 N. W. 198; *McDougald v. Dougherty*, 11 Ga. 570.

<sup>2</sup> See *Harrington v. Barnes*, 64 Mass. (10 Cush.) 106; *Blair v. Hamilton*, 48 Ind. 32.

But assignee may not substitute his own notes for deferred payments, *Rice v. Gibbs*, 40 Neb. 264, 58 N. W. 724.

<sup>3</sup> *Bell v. Mendenhall*, 71 Minn. 331, 73 N. W. 1086.

<sup>4</sup> By uncle of infant good, though not appointed guardian, *Brown v. Dysinger*, 1 Rawle (Pa.) 408.

<sup>5</sup> See *Gentry v. Gentry*, 33 Tenn. 87, 60 Am. Dec. 137, tenant in common. *Poehler v. Reese*, 78 Minn. 71, 80 N. W. 847, case where tender by one tenant in common was held sufficient as to himself and other tenants, they being minors; see *Bender v. Bean*, 52 Ark. 132, 12 S. W. 180, 241.

in itself is the act of election, it is probably the rule, by weight of authority, that one tenant may not make tender or payment on behalf of all so as to bind any tenant, other than himself, to the performance of the obligation.<sup>6</sup>

SEC. 903. TO WHOM PAYMENT OR TENDER MAY BE MADE.—Payment or tender of the price must be made to the person named in the option.<sup>1</sup> If no third person is expressly named in the option, then it must be made to the optionor;<sup>2</sup> unless it be made to some other person designated by the optionor, or impliedly authorized by him to receive it.<sup>3</sup> It follows, therefore, that payment or tender to a person not authorized to receive it, is insufficient.<sup>4</sup>

<sup>6</sup> See Sec. 805.

<sup>1</sup> *Te Poel v. Shutt*, 57 Neb. 592, 78 N. W. 288; and where so made, is good, *Brewer v. Brewer*, 19 Ala. 481.

<sup>2</sup> *Hoyt v. Hall*, 16 N. Y. Super. Ct. 42; *King v. Finch*, 60 Ind. 420.

<sup>3</sup> *Hoyt v. Hall*, 16 N. Y. Super. Ct. 42, third person designated; to trustee for collection of debts, *Hayward v. Munger*, 14 Iowa 516; to trustee of *cestui que* trust, *Chahoon v. Hollenbeck*, 16 Serg. & R. (Pa.) 425, 16 Am. Dec. 587; *Kleeb v. McInturff*, 71 Wash. 419, 128 P. 1076; to agent, *Stansbury v. Embrey*, 128 Tenn. 103, 158 S. W. 991, 47 L. R. A. (N. S.) 980; *Lanz v. McLaughlin*, 14 Minn. 72; *Degginger v. Martin*, 48 Wash. 1, 92 P. 674, the principal being absent from the state; to beneficiary in transaction involving fraud, *Harris v. Staples*, (Tex. Civ. App.) 89 S. W. 801; to officer of corporation, *Louisville R. Co. v. Williams*, 33 Ky. L. Rep. 168, 109 S. W. 874; *Smith v. Old Dominion etc. Ass'n*, 119 N. C. 257, 26 S. E. 40; *Birmingham Paint etc. Co. v. Crampton*, (Ala.) 39 So. 1020; *Briede v. Babst*, 131 La. 159, 59 So. 106; to sheriff under process of law, *Couchmans v. Boyd*, 24 Ky. 395.

<sup>4</sup> *Thurber v. Jewett*, 3 Mich. 295, servant; *McGuire v. Bradley*, 118 Ill. App. 59, servant; *King v. Finch*, 60 Ind. 420, court will not relieve.

Where there are several joint optionors, payment or tender, as distinguished from election, to one of them, is sufficient.<sup>5</sup>

Whether payment to the optionor's grantee of the optioned property is good, would seem to depend upon the terms of the grant, that is to say, whether by the terms of the grant the grantee becomes entitled to the option money and also whether the optionee has notice of the transfer and of the rights of the grantee.<sup>6</sup>

<sup>4</sup> Deposit in bank not good, *Cassville Roller Mill Co. v. Aetna Ins. Co.*, 105 Mo. App. 146, 79 S. W. 720.

To wife of insane party not sufficient, *Boyce v. Prichett's Heirs*, 36 Ky. (6 Dana) 231.

<sup>5</sup> *Moore v. Bevier*, 60 Minn. 240, 62 N. W. 281.

Tender to one of two tenants in common of lands, (the wife of the optionor-tenant under a contract which was void as to her because not separately acknowledged, etc.) is not good as against the husband, *Ledwith v. Reichard*, 203 Pa. 277, 52 Atl. 251.

<sup>6</sup> See *Burt v. Henry*, 10 Ala. 874, tender to assignee of note for price.

*Harrington v. Barnes*, 64 Mass. (10 Cush.) 106, tender to vendor and not to his grantee under conveyance made subsequent to bond for title.

*McLaughlin v. Royce*, 108 Iowa 254, 78 N. W. 1105, where the option to purchase was from the optionee's grantee (the purchaser), and his heirs and assigns, it was held payment must be made to the grantee's grantee, the optionor (the original grantor) having notice of the transfer.

In *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 67 L. R. A. 571, 110 A. S. R. 963, it was held the election and tender were properly made to the original optionor.

*Noyes v. Clark*, 7 Paige (N. Y.) 179, 32 Am. Dec. 620, tender to debtor after notice of assignment, where assignee's residence is unknown and he can not be found, is good.

Mere transfer of the property by the vendor is not an abandonment of the contract; there is no privity of contract between the purchaser and the grantee of the vendor; hence it is necessary to make tender to vendor to put him in default, *Parkside Realty Co. v. MacDonald*, 166 Cal. 426, 137 P. 21.

Payment and tender to the personal representative of a deceased optionor is, after his appointment, generally held sufficient.<sup>7</sup>

Deposit of the price with the original optionor with notice to an intervening purchaser, is good.<sup>8</sup>

SEC. 904. PLACE OF PAYMENT OR TENDER.—If the option expressly designates the place where notice of election shall be given and tender of the price made, notice must be given and tender made at that place,<sup>1</sup> and a tender made at such place is sufficient.<sup>2</sup> On the other hand, if the place is left to implication, then the rule is that the tender must be made at the place where the option agreement was executed,<sup>3</sup> and at the residence or office of the optionor.<sup>4</sup>

<sup>7</sup> *Parker v. Lincoln*, 12 Mass. 16, guardian; *Todd v. Parker*, 1 N. J. L. 45, before qualification.

But where option fixes place of tender, one made there is good though optionor is dead, *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997.

<sup>8</sup> *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150.

<sup>1</sup> And in such case readiness to pay at the place is sufficient, *Drown v. Ingels*, 3 Wash. 424, 28 P. 759. But refusal to receive payment or tender at a place other than that fixed by the agreement is a waiver of payment at the stipulated place, see *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286, 3 L. R. A. 90.

<sup>2</sup> *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997; *Roche v. Osborne*, (N. J. Eq.) 69 Atl. 176.

<sup>3</sup> *Mossie v. Cyrus*, 61 Ore. 17, 119 P. 485.

<sup>4</sup> *Greenawalt v. Este*, 40 Kan. 418, 19 P. 803; *Hinish v. Oliver*, 66 Kan. 282, 71 P. 520; *Herman v. Winter*, 20 S. D. 196, 105 N. W. 457.

The general rule as to payment of money is that, if no place of payment is specified in the contract, it is the duty of the debtor to seek the creditor and make payment to him personally, but if he is out of the state, readiness to pay within the state will be as effective as valid payment so far as forfeiture is concerned, *Hale v. Patton*, 60 N. Y. 233, 19 Am. Rep. 168.

Where no place is designated in the option, the optionor may determine whether the payment shall be made where the land is situated or at his residence in another state.<sup>5</sup>

A personal tender is probably good in every case where no objection is made by the optionor.

Under a contract for the sale of land, situate in Texas, contained in a letter from the owner, written from his home in Kentucky, in answer to an inquiry of plaintiff, and offering to sell it for a certain amount, cash in hand, plaintiff must make or tender payment in Kentucky, the place of residence of the proposed vendor.<sup>6</sup>

SEC. 905. PLACE OF PAYMENT OR TENDER, CONTINUED.—Where the optionor evades, tender at his house and to his son living there with him is good,<sup>1</sup> notwithstanding the general rule that personal tender is necessary.

When the optionee, on the day of the maturity of the option, visited the office of the optionor for the purpose of consummating the trade, and so notified the person in charge, the optionor being absent, such act constituted a tender of perform-

<sup>5</sup> Veith v. McMurtry, 26 Neb. 341, 42 N. W. 6; see Sawyer v. Brossart, 67 Iowa 678, 25 N. W. 876, 56 A. S. R. 371, residence of vendor.

<sup>6</sup> Scott v. Grant, 37 Tex. Civ. App. 169, 84 S. W. 265; see Greenawalt v. Este, *supra*; Gilbert v. Baxter, 71 Iowa 327, 32 N. W. 364; De Jonge v. Hunt, 103 Mich. 94, 61 N. W. 341; Egger v. Nesbit, 122 Mo. 667, 27 S. W. 385, 43 A. S. R. 596; Baker v. Holt, 56 Wis. 100, 14 N. W. 8; Arnett v. Tuller, 134 Ga. 609, 68 S. E. 330.

<sup>1</sup> Smith v. Smith, 25 Wend. (N. Y.) 405; see Stein v. Leeman, 161 Cal. 502, 119 P. 663, civil code Cal. Sec. 1489; Walter G. Reese Co. v. House, 162 Cal. 740, 124 P. 442, good at residence; Holmes v. Myles, 141 Ala. 401, 37 So. 588, letter to residence.

ance.<sup>2</sup> Where the optionor died before the expiration of the time limit a tender by the optionee made at the place specified in the option was held good.<sup>3</sup>

When plaintiff (notwithstanding defendant's statement that he would not convey) called at the home of defendant (vendor) with the money to make the payment and was told by defendant's family that defendant was absent, and they thought he was at a certain place out of the state, and plaintiff thereupon sent defendant a registered letter and deposited the money in the bank, instructing the cashier to deliver the same on deposit of the deed, the tender was sufficient and enabled plaintiff to maintain suit for specific performance under the South Dakota statutes relating to extinguishment and performance of obligations.<sup>4</sup>

#### SEC. 906. SUFFICIENCY OF TENDER.—

Tender is an offer of performance by a debtor or other person who is under obligation to pay the debt, or to perform the obligation, the actual payment or performance being prevented by the refusal of the creditor or person entitled to performance to accept the same.<sup>1</sup>

<sup>2</sup> *Lumaghi v. Abt*, 126 Mo. App. 221, 103 S. W. 104; *Judd v. Ensign*, 6 Barb. (N. Y.) 258.

And where the option designates the place of payment as the office of M, a tender to M at his office is good, *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997.

<sup>3</sup> *Mueller v. Nortmann*, 116 Wis. 468, 93 N. W. 538, 96 A. S. R. 997, but it is not good if the place of tender was not the one fixed by the option, *Prince v. Robinson*, 14 Fed. 631.

<sup>4</sup> *Herman v. Winter*, 20 S. D. 196, 105 N. W. 457.

<sup>1</sup> *Cape Fear Lumber Co. v. Small*, 84 S. C. 434, 66 S. E. 880.

To constitute a valid tender at common law the party must have the money at hand, immediately under control and must then and there not only be ready and willing, but produce and offer to pay the money to the other party upon performance by him of the requisite conditions.<sup>2</sup> Actual production of the money, however, is not necessary where the party to whom the money is due refuses to accept it,<sup>3</sup> or by his conduct shows an intention on his part not to accept it. In such cases, if the debtor has the money immediately available, at the time of his offer, the tender is good.<sup>4</sup>

A tender does not discharge the debt; it is an offer of performance only; the creditor still has the right to payment of the money. The effect of a valid tender, however, is to stop interest from the date of the tender,<sup>5</sup> and in any suit to recover the amount tendered, in which the debtor's plea of tender is sustained, the debtor is entitled to recover his costs,<sup>6</sup> and the creditor obtains judgment only for the amount tendered.

<sup>2</sup> *Heine v. Treadwell*, 72 Cal. 217, 13 P. 503, 505; *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248; *Deitz v. Stephenson*, 51 Ore. 596, 95 P. 803, ability not shown.

<sup>3</sup> See note 1, this section; *Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S. W. 773; *Latimer v. Capay Val. L. Co.*, 137 Cal. 286, 70 P. 82; *Hoffman v. Van Dieman*, 62 Wis. 362, 21 N. W. 542, evasion of tender.

But a refusal by optionor to remain at his office while optionee procured the money at a bank, is not a waiver, *Smith & Rice Co. v. Canady*, 213 Mass. 122, 99 N. E. 968.

<sup>4</sup> Actual production of the money is waived when the tender is refused, the ready money being immediately at hand, *Steckel v. Standley*, 107 Iowa 694, 77 N. W. 489.

<sup>5</sup> *McPheters v. Kimball*, 99 Me. 505, 59 Atl. 853; *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. 812.

<sup>6</sup> *Berthold v. Reyburn*, 37 Mo. 586.



A tender to be valid must be in accordance with the stipulations of the contract and at the time and place and in the mode therein specified.<sup>7</sup>

The technicalities of the common law rule do not apply where delivery of the stock and payment of the price are concurrent acts. In such case readiness, willingness and ability to pay are sufficient especially where the optionor evades and no particular time or place is fixed for the performance.<sup>8</sup> Nor, is an actual tender necessary where the optionee arranges for payment with the bank with which the optionor had deposited the deed in escrow to be taken up when the title to the land should be perfected, it appearing that the bank was ready to pay the money when the title was perfected and the deed should be ready for delivery, and it further appearing that an actual tender would have been refused by the vendor if made.<sup>9</sup>

SEC. 907. SUFFICIENCY OF TENDER, CONTINUED. CASES.—When payment is a necessary part of election mere readiness on the part of the optionee to pay is not sufficient. The optionee must pay the money as directed in the option, or the optionor is not bound.<sup>1</sup> Where the

<sup>7</sup> See Secs. 904, 913.

<sup>8</sup> *Guilford v. Mason*, 22 R. I. 422, 48 Atl. 386; nor does the rule apply where, upon election, the optionor said he had the money to pay with and wanted to pay but the optionee said he did not want the money and preferred to let it "lay," *Wheatland v. Silsbee*, 159 Mass. 177, 34 N. E. 192; *Boynton v. Woodbury*, 101 Mass. 346, agreement to repurchase shares of stock.

<sup>9</sup> *McCarty v. Helbling*, (Ore.) 144 P. 499.

<sup>1</sup> *Bundy v. Dare*, 62 Iowa 295, 17 N. W. 534.

price of the land is fixed at a certain sum per acre, a tender in the language of the option, reciting that the optionee is able, ready and willing to pay, though not stating the aggregate amount, is sufficient.<sup>2</sup>

Tender of a check in payment of the price at the bank where the escrow is held, which is refused by the optionor but which the cashier then offers to cash and to give the money to the optionor, is good.<sup>3</sup>

When, at the time of the option, the currency consisted only of gold and silver, a legal tender in payment of the price was required to be made in gold and silver only, notwithstanding the act of Congress making United States notes legal tender for debts.<sup>4</sup>

If the option gives the privilege of paying the whole of the price in cash, a tender of the price in cash is sufficient although other provisions of the option with reference to security in case of payment of the price partly in cash, are indefinite and uncertain.<sup>5</sup>

Where, in an option, the deferred payments are to be evidenced by a note and secured by mortgage, a tender of the cash payment without tender of the note and mortgage is insufficient.<sup>6</sup> Where the

<sup>2</sup> *Stein v. Leeman*, 161 Cal. 502, 119 P. 663. In this case the amount was subsequently tendered in court, and there was no objection to the tender.

<sup>3</sup> *Watkins v. Youll*, 70 Neb. 81, 96 N. W. 1042; *Kessler v. Pruitt*, 14 Idaho 175, 93 P. 965.

<sup>4</sup> *Willard v. Tayloe*, 8 Wall. (U. S.) 557, 19 L. Ed. 501.

<sup>5</sup> *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637.

<sup>6</sup> *Longfellow v. Moore*, 102 Ill. 289. The tender here spoken of is tender necessary to entitle optionee to a conveyance, and not tender as an act of election.

optionees are minor heirs and the option calls for a cash payment and a purchase money mortgage for the balance, an offer of the cash and the note and mortgage of the guardian of the minors authorized by the court, is sufficient.<sup>7</sup>

When by the terms of the contract the price is to be paid in installments, an offer by a purchaser of a lump sum is not a legal tender and does not place the vendor in default.<sup>8</sup>

**SEC. 908. AMOUNT OF PAYMENT OR TENDER. GENERALLY.**—To make tender good it is necessary, of course, that it be in accordance with the provisions of the option contract. A tender of money, therefore, for a less amount than required by the option is not sufficient,<sup>1</sup> unless excused upon

<sup>7</sup> *Ankeny v. Richardson*, 187 Fed. 550, 109 C. C. A. 316.

Assignee of optionee may not substitute his own note for that of the original optionee, *Rice v. Gibbs*, 40 Neb. 264, 58 N. W. 724, overruling *s. c.* 33 Neb. 460, 50 N. W. 436; but may that of the assignor and himself, *Souffrain v. McDonald*, 27 Ind. 269.

<sup>8</sup> *Hanson v. Fox*, 155 Cal. 106, 99 P. 489, 29 L. R. A. (N. S.) 338.

<sup>1</sup> *Bennett v. Farkas*, 126 Ga. 228, 54 S. E. 942; see *Rude v. Levy*, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 91, 127 A. S. R. 123; *Champion G. Min. Co. v. Champion Mines*, 164 Cal. 205, 128 P. 315.

Part payment is not sufficient, and tender of the balance after the expiration of the time limit is too late, *Binford v. Steele*, 161 N. C. 660, 77 S. E. 954; see *Fink v. Hough*, (Tex. Civ. App.) 153 S. W. 676; *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150, where the amount of outstanding mortgage was deducted from the tender, *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228, where amount of mortgage was paid into court; allowance for street where price is by the acre, *Sterriker v. McBride*, 157 Ill. 70, 41 N. E. 744.

On the facts a tender of the cash portion of the price less an amount necessary to clear encumbrances on the property is sufficient, especially where the optionor claims he is not bound by the option, *Murphy v. Hussey*, 117 La. 390, 41 So. 692; *Brewer v. Sowers*, *supra*.

some equitable ground, such as evasion by the optionor.<sup>2</sup>

An option on land at \$4 per acre "for an undivided one-half of all of said described lands" was construed as requiring the optionee to pay \$4 per acre for the entire area in order to acquire an undivided half interest therein.<sup>3</sup>

When the price is fixed at a certain sum per acre and the option describes the land by metes and distances and recites that it contains 410 acres "more or less," the acreage is determined by the actual acreage and not by the number of paper acres.<sup>4</sup>

A lease gave the tenant an option to purchase and provided that in case the landlord decided to sell he would give the tenant notice and the "refusal to purchase." The option to buy was for a stated sum and it was held that a tender of the amount for which the landlord offered to sell to another, which was less than the stated price, was not sufficient.<sup>5</sup>

<sup>1</sup> Case where timber was cut prior to election, *McCowen v. Pew*, 147 Cal. 299, 81 P. 958.

Bill praying for a decree for part payment of the price is not equivalent to a tender, *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497.

The rule "*de minimis*," etc., applies, *Ackerman v. Maddux*, 26 N. D. 50, 143 N. W. 147; *Irvin v. Gregory*, 79 Mass. (13 Gray) 215.

<sup>2</sup> *Emerson v. Fleming*, 246 Ill. 353, 92 N. E. 890.

<sup>3</sup> *Stein v. Archibald*, 151 Cal. 220, 90 P. 536.

<sup>4</sup> *Warden v. Telsa*, 87 N. Y. S. 853, 93 App. Dec. 520; see *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

<sup>5</sup> *Bennett v. Farkas*, 126 Ga. 228, 54 S. E. 942.

Where the lessee was given the preference right to purchase in case the lessor sold, at the sale price, the sale must be *bona fide* and the price not fictitious or fraudulent, *Ogle v. Hubbel*, 1 Cal. App. 357, 82 P. 217; *Manchester S. C. Co. v. Manchester R. Co.*, 2 Ch. Div. 37,

A tender of \$16,000 cash with interest on \$10,000 for one year is good under an option in a lease providing the lessor would convey the property for \$6000 cash and a note for \$10,000 payable in one year with interest.<sup>6</sup>

SEC. 909. AMOUNT OF PAYMENT OR TENDER. INTEREST, TAXES, RENTS, INSURANCE, ETC.—When the optionor is in default in not tendering his deed, he can not recover interest during the period of his default.<sup>1</sup> If the optionee has had the use of the lands after tender of the price which was not brought into court, he is chargeable with interest on the amount of the tender.<sup>2</sup> Where the closing of the sale is delayed by the optionor in order to enable him to furnish abstracts, interest on deferred payments of the

70 L. J. Ch. 468, 84 L. T. Rep. (N. S.) 436, 17 T. L. R. 410, 49 Wkly. Rep. 418; see *Marske v. Willard*, 169 Ill. 276, 48 N. E. 290, providing optionee will pay “as much as any other person”; see Secs. 211 and 212.

<sup>6</sup> *Zimmerman v. Brown*, (N. J. Eq.) 36 Atl. 675; see *Handy v. Rice*, 98 Me. 504, 57 Atl. 847.

<sup>1</sup> *Consolidated Coal Co. v. Findley*, 128 Iowa 696, 105 N. W. 206; *Finlen v. Heinze*, 32 Mont. 354, 80 P. 918; *McCarty v. Helbling*, (Ore.) 144 P. 499.

Optionor not entitled to interest on purchase money while in possession and refusing to perform, *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228.

But optionee entitled to interest on principal of mortgage being foreclosed and which was discharged by him, *Brewer v. Sowers*, *supra*.

<sup>2</sup> *Rankin v. Rankin*, 216 Ill. 132, 74 N. E. 763, affirming s. c. 117 Ill. App. 636.

Optionee is entitled to interest on payment made from date of his demand for return, *Buttner v. Smith*, (Cal.) 36 P. 652; but not when he is paying rent, *Grummer v. Price*, 101 Ark. 611, 143 S. W. 95.

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price runs from the time of the conveyance and not from the precise time fixed by the option.<sup>3</sup>

When taxes have been paid by the optionor, after making the option, a tender of their amount is essential to the optionee's right to enforce specific performance.<sup>4</sup>

The lessee in a lease containing an option is entitled to have the balance of the insurance money in lessor's hands credited as a payment on the price, he having exercised his option to purchase.<sup>5</sup>

A provision in a lease giving the lessee an option to purchase and providing that the conveyance shall be at the "cost and charge" of the grantee therein, does not require an assignee of the lessee to pay a counsel fee to the vendor for the examination of the assignee's title to ascertain if he is entitled to a conveyance.<sup>6</sup>

**SEC. 910. AMOUNT OF PAYMENT OR TENDER. THE SAME.**—Where the lessee exercises his option to purchase before the expiration of the

<sup>3</sup> *Moore v. Beiseker*, 147 Fed. 367, 77 C. C. A. 545.

Interest is not chargeable from date of refused tender, *Stein v. Leeman*, 161 Cal. 502, 119 P. 663, affirming 90 P. 536.

<sup>4</sup> *Vance v. Newman*, 72 Ark. 359, 80 S. W. 574, 105 A. S. R. 42; see *Murphy v. Hussey*, 117 La. 390, 41 So. 692, optionee deducted taxes and incumbrances; *Brink v. Mitchell*, 135 Wis. 416, 116 N. W. 16; effect of non-payment of taxes, *Ankeny v. Richardson*, 187 Fed. 550, 109 C. C. A. 316.

As to payment of street assessments see, *King v. Raab*, 123 Iowa 632, 99 N. W. 306; U. S. Internal Revenue Tax on optioned whiskey, *Moise v. Company*, 79 Neb. 124, 112 N. W. 372.

<sup>5</sup> *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150; *Wilbour v. Trow's Printing etc. Co.*, 1 N. Y. S. Rep. 231, 40 Hun. 639, rebate of insurance premium and allowance for taxes; see Sec. 512.

<sup>6</sup> *Hollander v. Central M. & S. Co.*, 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135.

leasehold term, he is not required to tender rent for the unexpired term. Tender of the price for the land alone is sufficient.<sup>1</sup>

Where the optionor wrongfully resumed possession of the mine before time of performance had expired, and operated it, extracting about \$19,000 of ore, netting \$3500, it was held the optionee was not entitled to specific performance in the absence of a demand for an accounting by the optionor for the ore, and tender of the balance due on the price, or an allegation, in his complaint for specific performance, of willingness to pay such balance.<sup>2</sup>

A lessee in a lease containing an option to purchase failed to perform all of the covenants therein on his part, but the lessor did not claim a forfeiture and the lessee exercised his option to purchase within the time limit and tendered the full amount of the price and sufficient in addition to cover all losses on account of his default, and it was held that he was entitled to specific performance.<sup>3</sup>

Where, at the time of the exercise of the option to purchase, the land was subject to a mortgage, the

<sup>1</sup> *Lee v. Cochran*, 157 Ala. 311, 47 So. 581. In this case the election was made before the maturity of the annual rental; the optionee was not required to pay the annual rental; the election was Aug. 30, 1907, the next annual rental matured Oct. 1, following; the ruling turned on the particular language of the lease (option).

No right to credit of rent on extension, *Grummer v. Price*, 101 Ark. 611, 143 S. W. 95.

<sup>2</sup> *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426, also that court will not repossess the optionee and fix new time to pay balance.

Case where timber was cut before option was exercised, *McCowen v. Pew*, 147 Cal. 299, 81 P. 958.

<sup>3</sup> *Bell v. Wright*, 31 Kan. 236, 1 P. 595. Lessee failed to pay taxes and build fence, both of which were quite immaterial if the optionee took the land.

optionee was entitled to exercise his option on tendering the agreed price less the amount of the mortgage.<sup>4</sup> The price, under an option contained in a lease, remains the same for the second year as the first where the lessor does not change the price as permitted by the terms of the lease, and refuses the price and tender and also repudiates the contract.<sup>5</sup>

SEC. 911. AMOUNT OF PAYMENT OR TENDER UNDER ARBITRATION AND VALUATION CLAUSES.—These clauses usually involve the more important question of their enforcibility, a subject which is presented in another place.<sup>1</sup> The purpose of such clauses is to leave the price open for determination by the parties themselves, by arbitrators or by appraisers, at the time of or after exercising the option privilege. The amount of the purchase price, therefore, is not known until it has been fixed, in accordance with the terms of the contract, by the parties designated or provided in the agreement, or, in some cases, by the court. Necessarily payment or tender can not be made until the amount of the purchase price has been thus fixed and if the proceedings are free from fraud, mistake, etc., the amount to be paid or tendered is the amount so fixed.

<sup>4</sup> *Smiddy v. Grafton*, 163 Cal. 16, 124 P. 433, Ann. Cas. 1913E, 921; see *McLaughlin v. Royce*, 108 Iowa 254, 78 N. W. 1105.

<sup>5</sup> *Abbott v. 76 Land Co.*, 87 Cal. 323, 25 P. 693.

Vendee not allowed a deduction on the price because of an outstanding but unexercised option on same land, *Shuemaker v. Nissley*, 225 Pa. 430, 74 Atl. 241.

<sup>1</sup> See Secs. 1212, 1213.



## SEC. 912. FAILURE TO OBJECT AS WAIVER OF FORM, MODE AND AMOUNT.—

With reference to the form and the mode of tender, any objection which the optionor has an opportunity of stating at the time and which could then be obviated by the optionee, is waived if not then stated.<sup>1</sup>

If no objection is made to a tender of a certificate of deposit upon the ground that it is not legal tender, or that it is for too large an amount, and that the creditor can not make change, such objections are waived.<sup>2</sup> When the optionor made no objection to the acceptance of a draft for the cash payment required by an option, and also where the optionee failed to assume a mortgage as part payment, (the optionor not being able to convey because he had an option only on the land) the tender is a substantial compliance with the option.<sup>3</sup>

A tender in bank notes not made a legal tender, is valid unless objected to at the time on the ground they are not legal tender.<sup>4</sup>

<sup>1</sup> The Codes of California state the general rule on the subject, see Civil Code, Section 1501, and Code of Civil Procedure, Section 2076.

<sup>2</sup> *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118; *Schaeffer v. Coldren*, 237 Pa. 77, 85 Atl. 98, Ann. Cas. 1914B, 175, check.

*Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195, objection to check as tender of the price, in specific performance, can not be raised after final decree.

As to payment of rent by check, *Kentucky Lumber Co. v. Newell*, 105 S. W. 972, 32 Ky. L. Rep. 396; *Pershing v. Feinberg*, 203 Pa. 144, 52 Atl. 22.

Offer to pay unliquidated debt by check when refused, is good, *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248.

Too large amount and demand for change, where refused, *People's Fur. & C. Co. v. Crosby*, 57 Neb. 282, 77 N. W. 658, 73 A. S. R. 504.

<sup>3</sup> *Primm v. Wise*, 126 Iowa 528, 102 N. W. 427.

<sup>4</sup> *Gaylord v. McCoy*, 161 N. C. 685, 77 S. E. 959.

When, at the time of payment, the optionor makes no objection to the terms of payment, a subsequent purchaser from him can not do so.<sup>5</sup> Objection must be made at the time of tender.<sup>6</sup>

Objection alone that the tender was too late prevents the vendor from questioning the authority of the agent who makes the tender.<sup>7</sup> A refusal to accept a tender from a purchaser, on the ground of nothing owing, is a waiver of the right to object to the time, mode and sufficiency of the tender,<sup>8</sup> and generally an objection on particular grounds, is a waiver of all other grounds, including a conditional election.<sup>9</sup>

Accepting an installment of the price without added interest then due, waives forfeiture for non-payment of entire amount of the installment, unless the vendor gives the purchaser notice and a reasonable time to pay the balance.<sup>10</sup>

Failure of the optionor to object to an election which proposes to fix a day for concluding the purchase, not fixed by the option, is not a waiver of

<sup>5</sup> *Veith v. McMurtry*, 26 Neb. 341, 42 N. W. 6.

<sup>6</sup> *Kentucky Chair Co. v. Commonwealth*, 105 Ky. 455, 49 S. W. 197, 20 Ky. L. Rep. 1279.

<sup>7</sup> *Keller v. Fisher*, 7 Ind. 718; see *Pennsylvania Min. Co. v. Thomas*, 204 Pa. 325, 54 Atl. 101; *Zeimantz v. Blake*, 39 Wash. 6, 80 P. 822.

<sup>8</sup> *Lucy v. Davis*, 163 Cal. 611, 126 P. 490.

<sup>9</sup> *Cates v. McNeil*, (Cal.) 147 P. 944, conditional election; *Rankin v. Rankin*, 216 Ill. 132, 74 N. E. 763; *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887; see *Coy v. Minn. & St. L. R. R. Co.*, 116 Iowa, 558, 90 N. W. 344; *Dowd v. Clarke*, 54 Cal. 48, demand of right to purchase waived failure to tender interest; *Keene v. Zindorf*, 81 Wash. 152, 142 P. 484, interest; *Montgomery v. DePicot*, 153 Cal. 509, 96 P. 305.

<sup>10</sup> *Garney v. Berkley*, 56 Wash. 24, 104 P. 1108.

the insufficiency of the election where the optionor treats the election as a mere proposal to which he replies with a demand for an additional price,<sup>11</sup> but when the stock to be delivered is placed in escrow with a bank with the assent of the purchaser, objection to the mode of tender was waived, the purchaser refusing to perform, claiming he had been advised he would not have to purchase the shares.<sup>12</sup>

SEC. 913. TIME OF PAYMENT. GENERALLY. (FIXED TIME.) — The parties to a contract for the payment of money have the right to fix thereby the time for its payment and the failure of the creditor to pay on the day fixed, is a breach entitling the debtor at once to enforce payment by action. In such case, that is, a contract involving the payment of money only, such as a promissory note, the creditor is not entitled to relief at law or in equity under the rule of forfeiture because that rule does not apply to such contracts.<sup>1</sup>

An option contract and the bilateral contract raised therefrom by election are contracts having for their object the acquisition of property in consideration of the payment of a price therefor.

<sup>11</sup> *Knox v. McMurray*, 159 Iowa 171, 140 N. W. 652.

<sup>12</sup> *Hoover v. Wolfe*, 167 Cal. 337, 139 P. 794, the stock was placed in escrow before the expiration of the time limit.

Demand for survey of land, *Cole v. Killam*, 187 Mass. 213, 72 N. E. 947.

Demand for deed with full covenants, *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25.

<sup>1</sup> *Houston v. Curran*, 101 Ill. App. 203, affirmed; *Curran v. Houston*, 201 Ill. 442, 66 N. E. 228; *Witcher v. Webb*, 44 Cal. 127; see, however, *Adams v. Rutherford*, 13 Ore. 78, 8 P. 896.

Under the latter form of contract, failure on the part of the optionee or purchaser to pay the price or any installment of the price on the day fixed by the contract, is a breach of the contract, but unlike a breach of contract involving the payment of money only, the breach will not, in all cases, work a discharge of the contract, and therefore, a forfeiture of the rights of the purchaser. A court of equity abhors forfeiture and penalties and, therefore, it has become a rule of that court that where the effect of a breach is to work a forfeiture, it will, in a proper case, relieve the purchaser and permit him to make payment at a day subsequent to that fixed by the contract.

The payment referred to, is a payment maturing after election and therefore one to be made under the bilateral contract. Where payment is the act of election, or is made a condition precedent, whether the rule of forfeiture applies depends on the facts. Ordinarily where time is not of the essence and compensation can be made, equity will grant relief.<sup>2</sup>

Where the facts of a particular case do not bring it within the rule of forfeiture, the failure to make payment is, as we have seen, a breach of the contract by the purchaser, and the effect of such breach

<sup>2</sup> See *Chipman v. Thompson*, Walk. Ch. (Mich.) 405, holding the substantial difference which governs courts of equity in cases of condition is not whether the condition be precedent or subsequent but whether compensation can or can not be made; also *Selden v. Camp*, 95 Va. 527, 28 S. E. 877; *City Bank of Baltimore v. Smith*, 3 Gill. & J. (Md.) 265, distinguishing between interposing to prevent *divesting* of estate and *giving* estate; case holding equity can not relieve against breach of condition precedent, *Wells v. Smith* 2 Edw. Ch. (N. Y.) 78; *Barnet v. Passumpsie T. Co.*, 15 Vt. 757, purchaser negligent.

is, ordinarily, to end his rights under the contract where the vendor is not in default or breach himself. But again, this general rule is subject to the qualification that the court will relieve the purchaser from a default in making payment or tender of the price, within the stipulated time, when such default was caused by the inequitable conduct of the vendor, or was due to fraud, accident, or mistake.<sup>3</sup>

But in the absence of some controlling equity, failure to pay or tender at the appointed time, discharges the vendor.

Thus, an unexplained delay of 5 months after notice of election, to make a payment within the time fixed by the option will prevent specific performance of the contract.<sup>4</sup> The failure of the optionee to pay the amount specified at the stipulated time amounts to a decision on his part not to purchase upon the terms proposed and deprives him, or after his death, his administrator, of any right to enforce the contract.<sup>5</sup>

A tender of the price after the expiration of the fixed time, in the absence of any controlling equity, does not entitle the lessee-optionee to specific performance of the option to purchase in the lease, where the lease provides that if the lessee made

<sup>3</sup> *Codding v. Wamsley*, (N. Y.) 4 *Thomp. & C.* 49, 1 *Hun.* 585; *Mix v. Baldue*, 78 *Ill.* 215; *Coyle v. Kierski*, (Del. Ch.) 89 *Atl.* 598, negligence of optionee and her attorney; *Smith v. Miller*, 54 *Ind. App.* 37; 101 *N. E.* 316; *Lonergan v. Goodman*, 241 *Ill.* 200, 89 *N. E.* 349; *Levy v. Lyon*, 153 *Cal.* 213, 94 *P.* 881.

<sup>4</sup> *Crandall v. Willig*, 166 *Ill.* 233, 46 *N. E.* 755; *Richardson v. Hardwick*, 106 *U. S.* 252, 27 *L. Ed.* 145, 1 *S. C.* 213; *Roberts v. Norton*, 66 *Conn.* 1, 33 *Atl.* 532.

<sup>5</sup> *Stembridge v. Stembridge*, 87 *Ky.* 91, 7 *S. W.* 611, 9 *Ky. L. Rep.* 948.

default in the payment of the price named and taxes and assessments, he would surrender possession, the court holding that the promise of the lessee to pay was not enforceable.<sup>6</sup>

SEC. 914. TIME OF PAYMENT. PAYMENT AS ELECTION DISTINGUISHED FROM PAYMENT AS PERFORMANCE.—In a leading case it is said, the language of the contract itself controls as to what act or acts constitute an election; that under the terms of one option, election may consist of payment or tender of the purchase price, while under the terms of another option, election may consist of a mere notice of election to purchase or some other specified act, leaving payment of the price and execution of deed of conveyance as subsequent matters in performance of the contract raised by the election; that in the first case, there is an election upon payment or tender of the price, and in the second, there is an election by performance of the particular act accepting the terms proposed by the option, the payment of the price being a condition subsequent, or rather, the performance of the executory contract raised by the election.<sup>1</sup>

In consequence of this distinction, if the election, by mere notice, is timely and properly made, a binding promise on the part of the optionor is

<sup>6</sup> *L'Engle v. Overstreet*, 61 Fla. 653, 55 So. 381.

<sup>1</sup> *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; see *Binford v. Steele*, 161 N. C. 660, 77 S. E. 954; *Smith's Appeal*, 69 Pa. St. 474; *Byers v. Denver Circle R. Co.*, 13 Colo. 552, 22 P. 951, 953; *Boston etc. R. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498, time of election of essence, but not time for delivering deed.

raised, and a tender of payment of the price, by the optionee, three days after the expiration of the stipulated time is, on the facts, within time and valid in equity.<sup>2</sup>

On the other hand, if, by the terms of the option, payment of the price, or some part thereof, is made a condition precedent to the exercise of the right to buy, and the option may impose such condition, the money must be paid or tendered, and a mere notice of intention to buy, or that the optionee will take the property, does not change the relation of the parties, and does not raise a binding promise on the part of the optionor.<sup>3</sup>

#### SEC. 915. SAME. CASES HOLDING PAYMENT NOT NECESSARY TO ELECTION.—

Under an agreement to sell coal giving the purchaser “an option or privilege of buying” the coal at any time within nine months from the date thereof, an election within the nine months without tender of the price within that time is sufficient.<sup>1</sup>

<sup>2</sup> *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249; *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171; *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637; *Zimmerman v. Brown*, (N. J. Eq.) 36 Atl. 675; *Mills v. Haywood*, L. R. 6 Ch. Div. 196; *Ranelagh v. Melton*, 34 L. J. Ch. 227, 11 L. T. Rep. 409, 13 Wkly. Rep. 150, 62 Eng. Reprint 627; *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150.

<sup>3</sup> *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687; *Borst v. Simpson*, 90 Ala. 373, 7 So. 814; see cases Sec. 916.

<sup>1</sup> *Penn. Min. Co. v. Martin*, 210 Pa. 53, 59 Atl. 436, the word “buy” used in the option was construed as not requiring the payment of the price within the stipulated time; see, also, *Penn. Min. Co. v. Smith*, 207 Pa. 210, 56 Atl. 426; *Penn. Min. Co. v. Smith*, 210 Pa. 49, 59 Atl. 316.

Under an option on coal lands at a certain price per acre, "one-third to be in cash on delivery of deed and the balance in two equal annual installments," an election and notice in time without payment or tender is good.<sup>2</sup>

Where a city has the charter right to purchase the franchise and property of a water corporation, "on payment to such corporation of actual cost," etc., of the plant, payment of the price is not part of the act of election,<sup>3</sup> nor is it where the agreement provides that payment of a certain amount of the price shall be made "on delivery of the deed."<sup>4</sup>

SEC. 916. SAME. CASES HOLDING PAYMENT OR TENDER NECESSARY TO ELECTION.—An option provided "the price agreed upon is \$12,000 *cash* upon payment of which the said C. H. L. will make deed," etc. It was held, under this option, that to entitle the optionee to a conveyance, he must not only elect but also tender the price within the option time.<sup>1</sup> The option used the word "buy" and the court held the word meant both "acceptance" and payment, reaching a conclusion at variance with the Pennsylvania

<sup>2</sup> *Turner v. McCormick*, 56 W. Va. 161, 49 S. E. 28, 107 A. S. R. 904, 67 L. R. A. 853.

<sup>3</sup> *Rockport W. Co. v. Rockport*, 161 Mass. 279, 37 N. E. 168.

<sup>4</sup> *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; see *Zimmerman v. Brown*, (N. J. Eq.) 36 Atl. 675; see Sec. 921, as to payment of price and delivery of deed being concurrent acts.

<sup>1</sup> *Killough v. Lee*, 2 Tex. Civ. App. 260, 21 S. W. 970; *Pollock v. Ridick*, 161 Fed. 280.

Where the option requires the optionee to "complete" the sale within the time limit, payment is included, *Dawson v. Dawson*, 8 Sim. 346, 59 Eng. Reprint 137.



court considering the same word in another but similar option contract.<sup>2</sup> Unless this decision can be distinguished by reason of fact that, by the terms of the option, the price was payable in "cash," within the time limit, irrespective of the delivery of the deed, it stands opposed to several well considered decisions cited in the next preceding section of this chapter.<sup>3</sup>

The principle of the cited case is supported by one from North Carolina<sup>4</sup> but the latter entirely ignores the rule that under the terms of the option there under consideration payment of the price and delivery of the deed were dependent covenants. It based its decision upon *Weaver v. Burr*,<sup>5</sup> a case subsequently distinguished by the same court in *Watson v. Coast*,<sup>6</sup> on the ground that the use of the word "cash" made payment or tender of the price a part of the election. The dissenting opinion of Justice Snyder, in the *Weaver* case, destroys it as a precedent, except possibly as distinguished in the *Watson* case. It should be noted also that the *Weaver* case was overruled in *Barrett v. McAllister*<sup>7</sup> on the point that tender must be made regardless of the right of the optionee to delivery of deed. The *Trodgen* decision, therefore, must be consid-

<sup>2</sup> *Penn Min. Co. v. Martin*, 210 Pa. 53, 59 Atl. 436.

<sup>3</sup> See, also, *Veith v. McMurtry*, 26 Neb. 341, 42 N. W. 6.

<sup>4</sup> *Trodgen v. Williams*, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867.

<sup>5</sup> *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

<sup>6</sup> *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

<sup>7</sup> *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220.

Under an option to repurchase, payment of the price or tender is a condition precedent to a reconveyance, see *Hubert v. Sistrunk*, (Ala.) 53 So. 819; also Secs. 828, 853.

ered as one where by the express terms of the option, payment was made a part of the election, or it is not in accord with the weight of judicial authority, and there seems to be sufficient room for interpretation on this point to justify the decision of the court on that ground.

SEC. 917. THE SAME, CONTINUED.—In another case an option to purchase timber provided, “if accepted the above mentioned parties are to have for said timber an additional amount of \$2450 in cash upon the making of the contract for the sale of said timber.” It was held the optionee was required to pay or tender the amount before the expiration of the option to entitle him to maintain an action to recover damages for refusal of the optionor to make the sale.<sup>1</sup> In this case it will be observed the option not only required a cash payment but also expressly provided that it should be made “upon the making of the contract for the sale of the timber.”

Where a lessee was granted an option privilege to purchase the premises “at any time before the expiration of this lease for \$11,117 to be paid down in cash to the first party, upon demand of a deed, prior to the expiration of this lease,” tender or payment of the price is made a part of the election and is a condition precedent to the consummation

<sup>1</sup> Pollock v. Riddick, 161 Fed. 280, price was “cash.”

See Spokane P. & C. Ry. Co. v. Ballinger, 50 Wash. 547, 97 P. 739, where \$1 was paid as consideration for option and \$899 to be paid on execution of deed; the latter sum was not tendered.

Levy v. Lyon, 153 Cal. 213, 94 P. 881, turned on the point there was no allegation of any tender in the cross-complaint; see, also, Couch v. McCoy, 138 Fed. 696, construed as requiring part payment of price.

of any binding contract, and this by force of the express provisions of the lease.<sup>2</sup>

In an Illinois case<sup>3</sup> the price was payable "one-fifth at the time of delivery of deed in cash" and the balance in five equal annual installments to be secured by mortgage, and further provided "said cash to be made and securities delivered on or about the 1st of December, 1892." It was held that an election without payment or tender of the cash payment was insufficient. This holding was clearly correct because the option agreement expressly made payment a part of the election.

There is an Iowa decision<sup>4</sup> to the effect that where nothing is expressly stated in the option as to when payment is to be made it must be implied that payment of the price or tender is a part of the election. The court overlooks the rule that in such case payment of the price and delivery of the deed are concurrent acts.<sup>5</sup> That case, however, did not call for any such exposition of the law and it is needless to add that no authorities are cited in

<sup>2</sup> *Steele v. Bond*, 32 Minn. 14, 18 N. W. 830; *McKenzie v. Murphy*, 31 Colo. 274, 72 P. 1075.

*Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150, the option made the price payable "before the expiration" of the time limit; see *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; *Weston v. Collins*, 11 Jur. (N. S.) 190, 34 L. J. Ch. 353, 13 Wkly. Rep. 510; also *Gaylord v. McCoy*, 161 N. C. 685, 77 S. E. 959.

<sup>3</sup> *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755, the delay in tendering was 5 months; see, also, *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687, where the option fixed a specific day for payment of the price.

<sup>4</sup> *Lockman v. Anderson*, 116 Iowa 236, 89 N. W. 1072.

*Hollmann v. Conlon*, 143 Mo. 369, 45 S. W. 275, is similar in that the optionee made no election within the ten days fixed by the option for examination of the abstract of title and acceptance thereof.

<sup>5</sup> See Sec. 921.

support of the proposition. The facts were that the optionee, as the court correctly held, did not elect and give notice within the option time. Such failure ended the rights of the optionee and it was quite immaterial whether or not payment or tender was made.

#### SEC. 918. TIME OF PAYMENT. CONSTRUCTION OF PARTICULAR CLAUSES.—

The general rule is that where there is no express provision fixing the time for the payment of the price, it is presumed to be a cash transaction.<sup>1</sup> So, with reference to a mortgage securing the price, if no time is fixed for payment, and there are no circumstances to indicate that the time of payment was to be postponed, the money is payable immediately.<sup>2</sup>

Where the agreement gives the vendee the right to pay the installments of the price “on or before” the date on which they are due, he can pay all of the installments before the first installment is due.<sup>3</sup>

An option to purchase contained in a lease stipulating that at the end of the term the lessee, on payment of full rent, may purchase the premises for a specified sum, does not require the lessee to pay or tender payment of the price at the time of giv-

<sup>1</sup> *Jones v. Moncrief-Cook Co.*, 25 Okl. 856, 108 P. 403; *Angel v. Simpson*, 85 Ala. 53, 3 So. 758; and of course not to be on credit, where the price is fixed, *Witting, Succession of*, 121 La. 501, 46 So. 606, 15 Ann. Cas. 379.

<sup>2</sup> *Richards v. Green*, 23 N. J. Eq. 536

<sup>3</sup> *Kaufman v. All Persons*, 16 Cal. App. 388, 117 P. 586.

ing notice of election, though payment will be essential before he is entitled to a conveyance.<sup>4</sup>

**SEC. 919. TIME OF PAYMENT NOT OF THE ESSENCE, WHEN.**—The rule is that time of payment of the price, under a contract raised by an election, is not essential unless expressly so provided in the agreement or implied from the circumstances.<sup>1</sup> As said in a Pennsylvania case, time is of the essence of the contract as related to the option, but not as to performance.<sup>2</sup> And with reference to a promise to pay money at a fixed date, the rule in equity is that time of payment is not ordinarily essential, so that merely suffering the appointed date to pass without payment, will not preclude the party from enforcing the contract.<sup>3</sup>

An option for the sale of real estate provided that if, at the end of 30 days, the option was not accepted by the vendee, and the second payment of \$1500 made, then, the sum of \$1500 paid should be forfeited to the optionor, and it was held time was of the essence of the agreement only with reference to the first two payments, and the second having been promptly made, the option was at an end, and the optionor, in case of non-performance by the optionee, was not entitled to retain the purchase money as a forfeiture, but could only retain an

<sup>4</sup> *Cates v. McNeil*, (Cal.) 147 P. 944.

<sup>1</sup> *Boston etc. R. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498.

The same rule obtains here as under the ordinary agreement of sale and purchase, *Langert v. Ross*, 1 Wash. 250, 24 P. 443; *Vance v. Newman*, 72 Ark. 359, 80 S. W. 574, 105 A. S. R. 42.

<sup>2</sup> *Smith's Appeal*, 69 Pa. 474.

<sup>3</sup> *Vance v. Newman*, 72 Ark. 359, 80 S. W. 574, 105 A. S. R. 42.

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amount sufficient to cover such loss as it had sustained by reason of the breach.<sup>4</sup>

SEC. 920. TIME OF PAYMENT ESSENTIAL. GENERALLY.—Having in mind that the payment we are now considering is not payment as an act of election, but the fulfillment of the promise of the optionee to pay the price at a date subsequent to the election, the rule on the subject is the same as that with reference to payment under a bilateral contract. If there is an express stipulation, the intention of the parties to make time essential must be clearly and unequivocally shown; merely fixing a day for the payment of the money does not make the time of payment essential,<sup>1</sup> but fixing a time and stipulating that if payment is not made within the time, the agreement shall be null and void, shows an intention to make time essential.<sup>2</sup>

On the other hand, if time is either expressly or impliedly made essential and the optionee fails to make timely payment in accordance with the terms of the option, the contingent interest of the optionee in the property is subject to termination at the optionor's election.<sup>3</sup>

<sup>4</sup> *Davis v. Barada-Ghio*, R. E. Co., 115 Mo. App. 327, 92 S. W. 113.

<sup>1</sup> *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150; *Jeffries v. Charlton*, 74 N. J. Eq. 430, 70 Atl. 145, agreement to reconvey.

<sup>2</sup> *Martin v. Morgan*, 87 Cal. 203, 25 P. 350, 22 A. S. R. 240; *Sowles v. Hall*, 62 Vt. 247, 20 Atl. 810.

<sup>3</sup> *Snider v. Yarbrough*, 43 Mont. 203, 115 P. 411; *Rude v. Levy*, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 91, 127 A. S. R. 123.

Tender after default though before notice of forfeiture, is too late, *Champion Gold M. Co. v. Champion Mines*, 164 Cal. 205, 128 P. 315.

Time of payment may be made of the essence by express stipulation or may arise by implication from the very nature of the property, or from the avowed objects of the seller or purchaser,<sup>4</sup> or by change in value or other circumstances,<sup>5</sup> or by subsequent notice to perform;<sup>6</sup> but in order to make time of the essence of the contract after it has been entered into, the time fixed must be reasonable.<sup>7</sup>

# SEC. 921. SAME. DELIVERY OF DEED AND PAYMENT OF PRICE AS CONCURRENT ACTS.—An election having been timely and prop-

<sup>4</sup> Taylor v. Longworth, 14 Pet. (U. S.) 172, 10 L. Ed. 405; Kemp v. Humphreys, 13 Ill. 573.

Woods v. McGraw, 127 Fed. 914, 63 C. C. A. 556, the optionor was in urgent need for money and the time was fixed by the parties with that object in view.

Standiford v. Thompson, 135 Fed. 991, 68 C. C. A. 425, nature of property.

<sup>5</sup> Standiford v. Thompson, *supra*.

<sup>6</sup> Clarno v. Grayson, 30 Ore. 111, 46 P. 426; Coyle v. Kierski. (Del. Ch.) 89 Atl. 598; Ellis v. Bryant, 120 Ga. 890, 48 S. E. 352.

When property is subject to fluctuation in value, time is of the essence: the rule is especially applicable to mining property, see Settle v. Winters, 2 Idaho 215, 10 P. 216. Snider v. Yarbrough, 43 Mont. 203, 115 P. 411; Waterman v. Banks, 144 U. S. 394, 36 L. Ed. 479, 12 S. Ct. 646; Harper v. Independence Dev. Co., 13 Ariz. 176, 108 P. 701; Gaines v. Chew, 167 Fed. 630; Durant v. Comegys, 3 Idaho 204, 28 P. 425; Clark v. American Dep. Co., 28 Mont. 468, 72 P. 978; Merk v. Bowery M. Co., 31 Mont. 298, 78 P. 519.

<sup>7</sup> Crawford v. Toogood, L. R. 13 Ch. Div. 153; Pegg v. Wisden, 16 Beav. 239, 16 Jur. 1105, 51 Eng. Reprint 770.

Courts lean against construing time of payment of money essential because a penalty will result and because interest is usually treated as full compensation, sometimes disregarding an express stipulation, Ellis v. Bryant, 120 Ga. 890, 48 S. E. 352; see Antonelle v. Kennedy & Shaw L. Co., 140 Cal. 309, 73 P. 966.

erly made the delivery of deed of conveyance and payment of the price under a clause in an agreement providing that the optionor shall execute a deed of conveyance for the property "at which time such consideration sum will become due and payable; and the said second party (optionée) then agrees to pay" the consideration, are mutual and dependent acts, and where, therefore, no deed was made and tendered, nor demand made for payment of the money, the optionee is not in default, the rule being that "so long as neither party makes any tender of the deed, on the one hand, or of payment, on the other, neither party is in default, and the contract subsists; either party may make proper tender and insist upon specific performance at any time, until barred by the statute of limitations.<sup>1</sup>

Tender of purchase money by a vendee under mutual and concurrent promises, means merely a readiness and willingness accompanied by ability to produce the money, provided the vendor will concurrently do the act required of him, and, hence a purchaser, in making tender, need not part with his money until he receives a conveyance, and in such case, he may make his offer or tender on condition that the vendor will execute his valid deed to the property bought, or, as sometimes said, "he who tenders for a deed need not part with his money till

<sup>1</sup> *Byers v. Denver Circle R. Co.*, 13 Colo. 552, 22 P. 951; see *Heine v. Treadwell*, 72 Cal. 217, 13 P. 503; *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Leaird v. Smith*, 44 N. Y. 618; *Cates v. McNeil*, (Cal.) 147 P. 944.



he can touch the deed, so he need run no risk for the safety of his money.'"<sup>2</sup>

**SEC. 922. SAME. DELIVERY OF DEED AND PAYMENT OF PRICE AS CONCURRENT ACTS, CONTINUED.**—In *Watson v. Coast*,<sup>1</sup> the option ran, “for the sum of \$1250 I hereby agree to sell and transfer” certain lands, provided the optionee elects within a certain time. It was held that tender or payment of the price was not part of the election, and that the covenant to pay the price and to convey was mutual and dependent, and that performance of one could not be required before the other was ready to be performed. The decision just cited follows the rule declared by the same court in *Barrett v. McAllister*,<sup>2</sup> which latter decision overruled *Weaver v. Burr*,<sup>3</sup> making a contrary ruling on substantially the same facts.

<sup>2</sup> *Binford v. Steele*, 161 N. C. 660, 77 S. E. 954; see *Phelps v. Davenport*, 151 N. C. 22, 65 S. E. 459; *Turner v. McCormick*, 56 W. Va. 161, 49 S. E. 28, 107 A. S. R. 904, 67 L. R. A. 853; *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; *Reynolds v. O’Neil*, 26 N. J. Eq. 223; *Wright v. Suydam*, 72 Wash. 587, 131 P. 239; see *Stevens v. Kittredge*, 44 Wash. 347, 87 P. 484; *Latimer v. Capay, V. L. Co.*, 137 Cal. 286, 70 P. 82; *Comstock v. Lager*, 78 Mo. App. 390.

In *Guilford v. Mason*, 22 R. I. 422, 48 Atl. 386, the court seems to have applied this rule to a case where, apparently, the payment was the act of election, but where, however, there was an attempt to tender, the optioner evading; *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869, option to repurchase.

Ordinarily time for delivery of deed is not essential, *Boston etc. Ry. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498.

<sup>1</sup> *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

<sup>2</sup> *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220.

<sup>3</sup> *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; see *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171, distinguishing the *Weaver* decision.

In another case,<sup>4</sup> the option provided that the price should be payable "on or before three months from the date hereof, upon presentation and delivery of a good and sufficient deed, clear of all encumbrances; payments to be made as follows: one-third at the time of presentation and delivery of deed, one-third in one year with interest, and one-third in two years," etc. It was held the optionor could not claim a forfeiture (there was a forfeiture clause but it did not fix a time limit for payment of the price), for failure to make the first payment within the option time, the optionee having "accepted" the option "upon the terms mentioned" in the option, and the optionor having failed to present a deed for delivery within the option time.

SEC. 923. TIME OF PAYMENT. WAIVER AND ESTOPPEL. GENERALLY.—We may say here as we said in a former chapter treating of the timeliness of election, that the rules presented in the preceding sections of this chapter with reference to the time of payment or tender are on the assumption that the untimely delay in making payment or tender was not brought about by the conduct of the optionor.

If the failure to make a timely election arises from the inequitable conduct of the optionor,<sup>1</sup> and the optionee is free from fault, equity disregards

<sup>4</sup> *McHenry v. Mitchell*, 219 Pa. 297, 68 Atl. 729; see, also, *Boston etc. Ry. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498; *Byers v. Ry. Co.*, 13 Colo. 552, 22 P. 951; *Hartman v. McAlister*, 5 N. C. 207.

<sup>1</sup> The conduct relied on must be that of the optionor and not of a third party, relating to collateral matters, see *Bradley v. Bradley*, 14 Ont. L. Rep. 473, 10 Ont. Wkly. Rep. 223, purchase from optionee.

time as essential whether so expressed or implied from circumstances and allows the optionee to make payment or tender after the expiration of the contract time, which is another way of saying that, in such cases equity does not permit the optionor to stand upon his strict contract rights and prevents him from declaring a forfeiture because of such delay.<sup>2</sup> The effect of such conduct, it is said, waives the timeliness of the tender and estops the optionor from taking advantage of his own wrongful conduct.

Again, in certain cases, payment or tender becomes unnecessary because the law does not require the performance of idle acts,<sup>3</sup> and also excuses certain delays due to accident and act of God.<sup>4</sup>

When time was originally of the essence of the contract to convey, but for sufficient cause, forfeiture for default therein has been waived, time ceases to be essential and thereafter is material only, until the vendor makes it essential by proper and reasonable notice and demand.<sup>5</sup>

<sup>2</sup> Though time be expressly made of the essence of the contract, yet generally time is not so treated by a court of equity, in the absence of neglect, or delay unaccounted for, *Durant v. Comegys*, 3 Idaho 204, 28 P. 425.

Non-payment does not *ipso facto* work a forfeiture; forfeiture is optional with vendor, but the right of the vendor to forfeit for non-payment must be exercised promptly on default, *Van Dyke v. Cole*, 81 Vt. 379, 70 Atl. 593.

<sup>3</sup> *Gaylord v. McCoy*, 161 N. C. 685, 77 S. E. 959.

<sup>4</sup> Civil Code California, Section 1511.

<sup>5</sup> *Beone v. Templeman*, 158 Cal. 290, 110 P. 947.

SEC. 924. WAIVER AND ESTOPPEL. PAYMENT CONSIDERED AS ACT OF ELECTION.—It is clear on principle and sustained by authority that a mere repudiation of an option contract by the optionor, or his refusal before the expiration of the time limit, to perform it, or his mere default, does not dispense with the necessity of election and notice by the optionee in order to turn the option into a binding promise to sell,<sup>1</sup> and when payment of the price, or of an installment, is a part of the election, the same general rule seems applicable. But there is a distinction running through the cases. Courts look upon election as an act which may be formally communicated by notice, or it may arise from conduct, but in the latter case the conduct must be brought to the knowledge of the optionor, or there must be some conduct on his part which takes the place of a formal notice of election. Payment of the price, however, even though by the terms of the option made the act of acceptance, is looked upon as having to do with the performance of the contract, and, therefore, if at the time it becomes the duty of the optionee to act under the option, or prior thereto, the optionor has indicated to the optionee the information that he absolutely refuses to perform the option agreement on his part and will not accept payment if tendered, notice of the exercise of the privilege to purchase, without payment or tender, at the same time, is, as a rule,

<sup>1</sup> *Kelsey v. Crowther*, 162 U. S. 404, 40 L. Ed. 1017, 16 S. Ct. 808, failure of optionor to deliver abstract; *Marsh v. Lott*, 8 Cal. App. 384, 97 P. 163; see *Gordon v. Darnell*, 5 Colo. 302.

sufficient,<sup>2</sup> perhaps on the theory that equity resolves the act into its two parts of election and payment, the former raising a real contract, the effect of which is to vest the equitable title to the property in the optionee and thus make applicable the rule as to forfeiture,<sup>3</sup> especially where money has theretofore been paid on the price or possession taken and improvements made. In such case "the doctrine of equity is not forfeiture, but compensation," the compensation being the payments past due with interest.<sup>4</sup>

SEC. 925. SAME. CASES HOLDING PAYMENT OR TENDER NECESSARY.—Lockman v. Anderson<sup>1</sup> may be taken as typical of the class.

<sup>2</sup> Borst v. Simpson, 90 Ala. 373, 7 So. 814; Brewer v. Sowers, 118 Md. 681, 86 Atl. 228, optionor evaded; Barnes v. Rea, 219 Pa. 279, 68 Atl. 836; Barnes v. Hustead, 219 Pa. 287, 68 Atl. 839.

Mansfield v. Hodgdon, 147 Mass. 304, 17 N. E. 544, the price was payable in cash, but the court said the undertaking was not a mere offer, but a conditional covenant to sell.

Bullock v. Cutting, 140 N. Y. S. 686, the price was payable in cash. Refusal of wife to join in deed not waiver, Bowen v. McCarthy, 85 Mich. 26, 48 N. W. 155, but see Mansfield v. Hodgdon, *supra*.

Murphy v. Hussey, 117 La. 390, 41 So. 692, deposit not necessary.

Palmer v. Clark, 52 Wash. 345, 100 P. 749, pleading.

Under a "refusal," see Cummings v. Nielson, 42 Utah 157, 129 P. 619.

<sup>3</sup> See Clarno v. Grayson, 30 Ore. 111, 46 P. 426, 430; see Guilford v. Mason, 22 R. I. 422, 48 Atl. 386, where payment and technical common law tender were excused because optionor evaded.

<sup>4</sup> See Wilson v. Herbert, 76 Md. 489, 25 Atl. 685; see Shouse v. Doane, 39 Fla. 95, 21 So. 807.

<sup>1</sup> Lockman v. Anderson, 116 Iowa 236, 89 N. W. 1072, the court was undoubtedly correct in holding on the facts there was no waiver of payment, but the reasoning of the court as to the time of payment as well as its construction of the clause is not convincing. The fact that no time of payment was expressly fixed by the option, is negligible, except perhaps as a circumstance tending to show an intention

The optionor agreed to sell to the optionee a certain lot and building "for a consideration of \$5500" on the condition that the optionee desired "to buy the same by the first of March, 1900." The court construed this language as requiring payment as part of the election, on the theory that as no time of payment was expressly fixed, the court was bound to hold the intention was that the purchase price was to be paid on the day named. The fact was the optionee on the day before the expiration of the time limit, as the court puts it, "communicated to the defendant his purpose" of availing himself of the option to take the property and advised the optionor that he would conclude the transaction on the following day (the day of expiration); that on the following day the optionee "had more conversation with the defendant" (optionor) with reference to postponing the final consummation of the transaction until March 3rd (after the expiration of the option); and that on the 3rd of March the optionee tendered to the defendant the agreed price for the property and the defendant refused to execute a deed. The court held there was no waiver of tender.

SEC. 926. THE SAME. CASE HOLDING PAYMENT OR TENDER NOT NECESSARY.—Smith v. Gibson,<sup>1</sup> involved an option to purchase,

to make payment and delivery of deed concurrent acts. The court having held there was no waiver, it would seem that the only ground upon which to sustain the decision is to construe the word "buy" to mean election and payment of the price.

<sup>1</sup> Smith v. Gibson, 25 Nev. 511, 41 N. W. 360; see Krentzer v. Lynch, 122 Wis. 474, 100 N. W. 887; Mansfield v. Hodgdon, 147 Mass. 304, 17 N. E. 544; Butler v. Threlkeld, 117 Iowa 116, 90 N. W. 584.

contained in a lease of the premises, granting the optionee the right to purchase the premises at any time during the term of the lease, for a certain sum, and in which nothing was expressly provided with reference to the time or the conditions of payment of the price. In this particular case the optionee, during the term, exercised his right to purchase and gave notice thereof, and at that time the agent of the optionor notified him that he would not carry out the contract. The optionee did not tender the purchase price, and the court held that tender was unnecessary to entitle him to specific performance because of the refusal of the agent of the optionor to carry out the contract, a tender having been personally made prior to the commencement of the suit, which was again refused.

It is held in a California case,<sup>2</sup> that where, under an option giving the right to purchase property for a certain sum, without further condition or qualification, the declaration of the optionor prior to the expiration of the option period that he will not execute a deed, releases the optionee from the necessity of tendering the price as a condition of maintaining a suit for specific performance.

<sup>1</sup> *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195, denial of liability and refusal to consider question of sale, renders formal tender of price before suit unnecessary.

<sup>2</sup> *Stanton v. Singleton*, (Cal.) 54 P. 587, reversed on other grounds, in 126 Cal. 657, 59 P. 146, 47 L. R. A. 334; and the same rule applies to the performance of other conditions by the optionee, *George ete. Co. v. Maxwell*, 78 Ohio St. 54, 84 N. E. 595; this rule has reference only to tender or payment and, of course, does not excuse the optionee from performing or tendering performance before suit or in his complaint; see, also, *Harper v. Runner*, 85 Neb. 343, 123 N. W. 313; *U. B. Blalock & Co. v. W. D. Clark & Bro.*, 133 N. C. 306, 45 S. E. 642; *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869.

And the same conclusion is reached in another case<sup>3</sup> where, prior to the expiration of the time limit of the option, the optionee advised the optionors that he intended to accept it and before the expiration of the option, the optionors notified the optionee they had withdrawn the option and would no longer abide by the same, whereupon the optionee notified the optionors of his election and that he was prepared to pay the full purchase price. The court applied the old rule that the law does not require idle acts and correctly held the conduct of the optionors waived the necessity of an actual tender of the price, it appearing that the optionee was ready, able and willing to pay the price and receive the deed.

**SEC. 927. TIME OF PAYMENT. WAIVER. NATURE AND ESSENTIALS OF ACTS TO CONSTITUTE.**—It is the general rule that where tender of an act as performance is necessary to establish any right against another party, tender or offer of performance is waived or becomes unnecessary when it is reasonably certain that the offer will be refused, that is, that payment or performance will not be accepted.<sup>1</sup> However, as stated in the rule, it must be reasonably certain that the other party will refuse to accept performance of the act if tendered. Thus, the assertion by the optionor that he will be unable or will refuse to perform, is not necessarily a refusal of performance on his part so as to excuse timely payment or tender. To work

<sup>3</sup> Winslow v. Dundom, 46 Mont. 71, 125 P. 136.

<sup>1</sup> Gaylord v. McCoy, 161 N. C. 685, 77 S. E. 959.



this result there must be a distinct, unequivocal and absolute refusal and it must be treated and relied on by the optionee as such;<sup>2</sup> and it must be final. Consequently where a refusal is made to depend upon the fact whether the optionee and another person would agree, and the optionor expressly states, in a letter to the optionee that if there was no such agreement, he was to let the optionor know, a tender is not excused.<sup>3</sup>

The denial of the right to make tender, or the positive and unqualified assertion by the optionor that henceforth he is not bound, is, in effect, a waiver of strict performance, and a notice that the optionee may as well proceed in due time to the enforcement of the obligation; as otherwise, no performance could be obtained at his hands.<sup>4</sup>

SEC. 928. TIME OF PAYMENT. WAIVER AND ESTOPPEL. CONDUCT OF OPTIONOR. GENERALLY.—If the optionee does not make a tender in time owing to negotiations with the optionor to induce his wife to join in a deed of conveyance to him, the condition of the agreement with respect to the time of payment is waived.<sup>1</sup> So, where pending negotiations for an accounting of

<sup>2</sup> *Borst v. Simpson*, 90 Ala. 373, 7 So. 814, holding notice of revocation is not an absolute refusal as applied to payment as an act of election.

<sup>3</sup> *Beiseker v. Amberson*, 17 N. D. 215, 116 N. W. 94.

<sup>4</sup> *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426, 431.

<sup>1</sup> *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544.

So where the purchaser prevents the vendor from repaying the purchaser (option to repurchase) within the option time, by interfering with negotiations by him for sale of property, in pursuance of conspiracy to force vendor to part with the property at less than its value, *Breyfogle v. Walsh*, 80 Fed. 172, 25 C. C. A. 357.

rents to be applied on the option price and costs of improvements, the option time expired while the negotiations were going on and thereupon the optionor declined further to consider the matter and terminated the negotiations, it was held that a strict performance of the contract by the optionee was waived and that his rights could not be forfeited without reasonable notice.<sup>2</sup> The same ruling was made in another case where part of the price was paid within the stipulated time but full payment was prevented or delayed by the objections of the optionor to statements of account between the parties, thereby postponing payment beyond the time limit.<sup>3</sup>

The optionee gave timely and proper notice of election and the optionor refused to execute the contract of sale unless it contained certain provisions not required by the option, and the optionee refused to accept such a contract; on the day named for the conveyance, the optionor tendered a deed in accordance with the option, but the optionee did not then have the money ready because he had assumed the optionor would not tender a proper deed, and it was held there was no breach on the part of the optionee.<sup>4</sup>

Where the optionor orally extends the time for making payment under the option, he is estopped from taking advantage of a non-compliance with the terms of the option, and the optionee has the

<sup>2</sup> *Henion v. Bacon*, 91 N. Y. S. 399, 100 App. Div. 99.

<sup>3</sup> *Wilkins v. Evans*, 1 Del. Ch. 156.

<sup>4</sup> *Boyd v. DeLancey*, 45 N. Y. S. 693, 17 App. Div. 567.

extended time within which to perform.<sup>5</sup> So, where the optionor informs the optionee that he does not care how the installments are paid. In such case, there is a waiver of timely payments and payment of the past due installments within 10 days after notice of forfeiture for default, is in time.<sup>6</sup>

Where the optionor incapacitates himself from complying with the option contract by disposing of the land to a third person, the optionee need not make tender, under the option, in order to hold the optionee liable in damages.<sup>7</sup> So, where the optionor prevents the optionee from performing the conditions of the option.<sup>8</sup>

SEC. 929. SAME CONTINUED.—The mere fact that the optionor demanded payment in excess of the amount due under the option is not a waiver of the optionor's right to declare the contract forfeited for non-payment at maturity of an installment of the price.<sup>1</sup>

The furnishing of an abstract by the optionor five days after the stipulated time, where the same is received by the optionee without objection and approved, does not excuse the optionee from a delay

<sup>5</sup> *Scott v. Hubbard*, 67 Ore. 498, 136 P. 653.

<sup>6</sup> *Noyes v. Schlegel*, 9 Cal. App. 516, 99 P. 726, and the waiver applied also to option on adjoining lots.

<sup>7</sup> *Palmer v. Clark*, 52 Wash. 345, 100 P. 749; *Chesbrough v. Vizard*, 156 Ky. 149, 160 S. W. 725; *Cummings v. Nielson*, 42 Utah 157, 129 P. 619; but this rule does not apply where the contract binds the "assignee" of the parties. *Merritt v. Joyce*, 117 Minn. 235, 135 N. W. 820; *Cumberledge v. Brooks*, 235 Ill. 249, 85 N. E. 197.

<sup>8</sup> *Stanton v. Singleton*, (Cal.) 54 P. 587; *Wilkins v. Evans*, 1 Del. Ch. 156.

<sup>1</sup> *Champion G. Min. Co. v. Champion Mines*, 164 Cal. 205, 128 P. 315.

in failing to make payment of the price within the contract time, the abstract having been furnished to the optionee in time to make the payment had he so desired;<sup>2</sup> but it is otherwise where the abstract required to be furnished by the optionor is furnished by him as to part of the lands after the expiration of the time limit for making the payment.<sup>3</sup>

A statement by an optionor that he failed to execute a deed because his wife refused to join therein is not a waiver of the cash payment required by the option.<sup>4</sup>

Under a contract to repurchase stock, failure of the seller to answer a letter from the purchaser which merely offers to tender the stock, is not a waiver of actual tender.<sup>5</sup>

**SEC. 930. TIME OF PAYMENT. WAIVER AND ESTOPPEL. REFUSAL AND REPUDIATION BY OPTIONOR. GENERALLY.**—The refusal by the optionor to deliver the cotton

<sup>2</sup> Kentucky etc. Co. v. Warwick Co., 109 Fed. 280, 48 C. C. A. 363.

See Lechner v. Strauss, 50 Ind. App. 414, 98 N. E. 444, involving waiver by optionee of extension of time to deliver abstract for approval.

Kelsey v. Crowther, 162 U. S. 404, 40 L. Ed. 1017, 16 S. Ct. 808, where payment was held necessary within stipulated time though optionor did not furnish abstract.

Smith v. Miller, 54 Ind. App. 37, 101 N. E. 316, payment held necessary in time fixed, the optionor making a survey called for by the contract, and the optionee delayed because he claimed the survey was not complete.

<sup>3</sup> Moore v. Beiseker, 147 Fed. 367, 77 C. C. A. 545.

<sup>4</sup> Bowen v. McCarthy, 85 Mich. 26, 48 N. W. 155, nor is the fact that the optionor never formally withdrew the option. *Id.*

<sup>5</sup> Olsen v. Northern S. S. Co., 70 Wash. 493, 127 P. 112.

optioned because the price has gone up, makes it unnecessary for the optionee to make tender of actual cash to entitle him to damages for non-delivery.<sup>1</sup>

Refusal of the optionor to deliver his deed excuses tender of the price;<sup>2</sup> so, where long before the expiration of the option, the optionee had word that the optionor would not give a deed to the property embraced in the option;<sup>3</sup> or, where the optionor tenders a deed before the expiration of the stipulated time which omitted part of the optioned land and notified the optionee the balance would not be conveyed, and refused to settle a creditor's suit.<sup>4</sup> So, where the optionor, before suit was commenced, informed the optionee that he was not bound by the option;<sup>5</sup> or, that no payments of any kind would thereafter be accepted;<sup>6</sup> or, declared the stock to be repurchased was worthless,

<sup>1</sup> *U. B. Blalock & Co. v. W. D. Clark & Bro.*, 133 N. C. 306, 45 S. E. 642.

The rule is applicable only to the party who "first" makes known he will not accept performance, *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637, 639.

<sup>2</sup> *Houghwout v. Boisaubin*, 18 N. J. Eq. 315; *Phelps v. Davenport*, 151 N. C. 22, 65 S. E. 459.

*Cape Fear L. Co. v. Small*, 84 S. C. 434, 66 S. E. 880, optionor objected to deed tendered by optionee as containing unauthorized conditions but which were waived by optionee.

<sup>3</sup> *Shattuck v. Cunningham*, 166 Pa. 368, 31 Atl. 136, there was an agreement for waiver of tender made by attorney of optionor, but never signed by the optionor.

<sup>4</sup> *Gaylord v. McCoy*, 161 N. C. 685, 77 S. E. 959.

<sup>5</sup> *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887; *Reynolds v. O'Neil*, 26 N. J. Eq. 223, tender before suit was not necessary.

Refusal, etc., by one of several heirs who had succeeded to the optioned property, *Rockland etc. Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, Ann. Cas. 1913B, 62.

<sup>6</sup> *West v. Washington etc. R. Co.*, 49 Ore. 436, 90 P. 666.

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and that he did not want it;<sup>7</sup> or, that he would not convey;<sup>8</sup> or, that a tender would be refused;<sup>9</sup> or, denied the right of the optionee to purchase under the lease.<sup>10</sup>

The repudiation of the agreement by the optionor, after the expiration of the time limit, does not excuse a failure of the optionee to make tender before expiration of the time;<sup>11</sup> but it is otherwise where the act of repudiation occurs before the expiration of the option time.<sup>12</sup>

SEC. 931. TIME OF PAYMENT. WAIVER BY ACCEPTING PAST DUE PAYMENTS.—The rule is, that notwithstanding time of payment is made essential either expressly or by implication, still if the vendor accepts installments of the price after they are due, with knowledge of the facts, there is a suspension of the right of forfeiture which can only be revived by giving definite notice to the purchaser of an intention to enforce the time provision of the agreement as to future install-

<sup>7</sup> *Williams v. Patrick*, 177 Mass. 160, 58 N. E. 583.

<sup>8</sup> *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637; *Gaylord v. McCoy*, 161 N. C. 685, 77 S. E. 959; *Harper v. Runner*, 85 Neb. 343, 123 N. W. 313.

<sup>9</sup> *Finlen v. Heinze*, 32 Mont. 354, 80 P. 918; see *McCormick v. Hickey*, 56 N. J. Eq. 848, 42 Atl. 1019.

<sup>10</sup> *Dowl v. Clarke*, 54 Cal. 48, the tender lacked interest due; *Winslow v. Dandom*, 46 Mont. 71, 125 P. 136.

<sup>11</sup> *Heine v. Treadwell*, 72 Cal. 217, 13 P. 503.

<sup>12</sup> *Stanton v. Singleton*, (Cal.) 54 P. 587; *Tevis v. Tevis*, 259 Mo. 19, 167 S. W. 1003.

Where first tender is refused, a second tender is not necessary, *Paddell v. Janes*, 145 N. Y. S. 868.

ments,<sup>1</sup> allowing, of course, a reasonable time to the vendee to comply therewith.<sup>2</sup> But a waiver of default in the timely payment of one installment will not operate as a waiver of a subsequent failure.<sup>3</sup>

Where a deed provides for a repurchase of the property within two years, the option to repurchase survives after such time when the grantee receives remittances on the investment thereof at a lower per cent than provided in the deed.<sup>4</sup>

The receipt by a lessor of rent, after it was due, under a lease and option to purchase, made forfeitable on failure to pay rent at maturity, was not a waiver of the time of payment, as a condition precedent to the exercise of the option, because of the dual nature of the lease-option, rendering payment of the rent payable under the lease without regard to the option;<sup>5</sup> but there is a waiver by receiving rent after it is due under a lease-option

<sup>1</sup> *Stevinson v. Joy*, 164 Cal. 279, 128 P. 751.

Acceptance of payment by vendors after forfeiture and resale by him to third person, does not work a waiver as against the third person, *Northern Assur. Co. v. Stout*, 16 Cal. App. 548, 117 P. 617.

<sup>2</sup> *Gray v. Pelton*, 67 Ore. 239, 135 P. 755; *Scott v. Hubbard*, 67 Ore. 498, 136 P. 653; *Douglas v. Hanbury*, 56 Wash. 63, 104 P. 1110.

<sup>3</sup> *Gray v. Pelton*, *supra*; *Boone v. Templeman*, 158 Cal. 290, 110 P. 947.

<sup>4</sup> *Connolly v. Keenan*, 87 N. Y. S. 630, 42 Misc. Rep. 589.

<sup>5</sup> *Brown v. Larry*, 153 Ala. 452, 44 So. 841; see Sec. 717, note 2.

See *Davis v. Robert*, 89 Ala. 402, 8 So. 114, 18 A. S. R. 126, holding waiver where the contract for leasing provided for conveying the property upon full payment of rent for term without further or other consideration.

Also *Noyes v. Schlegel*, 9 Cal. App. 516, 99 P. 726, where waiver by receiving past due installment was held to go to the entire contract and therefore to option in adjacent lots.

providing that if the lessee keeps all the conditions of the lease he may purchase the leased lands.<sup>6</sup>

SEC. 932. TIME OF PAYMENT. WAIVER BY RECOGNITION OF OPTIONEE'S RIGHTS.—If the vendor, after the expiration of the stipulated time, recognizes the right of the vendee to the property and asks to have refunded to him the taxes on the same for one year which had been paid on it subsequent to the expiration of the time limit, the vendee having paid all other taxes, a waiver of the time stipulated for the payment of the purchase money, may be inferred.<sup>1</sup> So, where an abstract of title is furnished to part of the lands optioned after the expiration of the time to make payment of an installment of the price, and was furnished with a view to the performance of the contract by the optionee.<sup>2</sup>

Where the lessor-optionor, after default by the optionee in payment of the price, and to complete the contract, threatens hostile measures to compel the completion of the contract and gives notice that the contract must be complied with in six weeks, which the court holds was not a reasonable time under the circumstances to complete the contract, the default of the optionee is waived by the insistence of the optionor on the completion of the contract.<sup>3</sup> So, where, after failure at the time of

<sup>6</sup> Mack v. Dailey, 67 Vt. 90, 30 Atl. 686.

<sup>1</sup> Mix v. Baldue, 78 Ill. 215.

<sup>2</sup> Moore v. Beiseker, 147 Fed. 367, 77 C. C. A. 545.

<sup>3</sup> Pegg v. Wisden, 16 Beav. 239, 16 Jur. 1105, 51 Eng. Reprint 770; see Mathews Slate Co. v. New Empire Slate Co., 122 Fed. 972, operating under mining lease after notice to terminate.



election, to pay an installment of the price as required, the optionor, upon tender of the installment, acknowledges the option agreement for record,<sup>4</sup> or informs the vendee he does not care how the installments are paid so long as he has the money in the time fixed by the contract.<sup>5</sup>

The optionor, by requesting a postponement of the tender, thereby impliedly recognizes the validity of the option and is thereby estopped to claim the agreement is invalid under the Statute of Frauds.<sup>6</sup>

On the other hand, when, after the expiration of the time limit, tender is made, the fact that the optionor insisted upon payment of taxes and expenses before the deed would be delivered, can not be construed as a recognition of the binding force of the original option after its expiration.<sup>7</sup>

The receipt of rent after it is past due under a lease containing an option to purchase, is not a recognition of the existence of the option contained therein;<sup>8</sup> but it is otherwise where the contract for leasing contemplates that upon payment of the rent for the full term, the leased property shall be conveyed to the lessee without payment of further consideration.<sup>9</sup>

<sup>4</sup> *Barnes v. Rea*, 219 Pa. 279, 68 Atl. 836; *Barnes v. Hustead*, 219 Pa. 287, 68 Atl. 839.

<sup>5</sup> *Noyes v. Schlegel*, 9 Cal. App. 516, 99 P. 726.

<sup>6</sup> *Alston v. Connell*, 140 N. C. 485, 53 S. E. 292.

<sup>7</sup> *Nelson v. Stephens*, 107 Wis. 136, 82 N. W. 163.

<sup>8</sup> *Brown v. Larry*, 153 Ala. 452, 44 So. 841.

<sup>9</sup> *Davis v. Robert*, 89 Ala. 402, 8 So. 114, 18 A. S. R. 126.

**SEC. 933. TIME OF PAYMENT. WAIVER AND ESTOPPEL. EVASION BY OPTIONOR AND ABSENCE.**—If the election is timely made and subsequently, but within the optioned time, the optionee attempts in good faith, to make a stipulated payment to the optionor which was payable at the time of election, and the optionor evades and prevents tender within the stipulated time, and the optionee on the last day, files a bill for specific performance and deposits the money in court, such conduct on the part of the optionor waives formal timely payment or tender, the court saying that to require tender, under such circumstances would not only be without precedent but contrary to every principle of justice and equity.<sup>1</sup>

When the optionee makes an election and gives notice in time, but is not able to make actual pay-

<sup>1</sup> *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228, the attempt to pay was made three times at the residence of the optionor before the expiration of the time limit; it is not apparent why on the facts this in itself was not sufficient in law as a tender, the optionor evading; also *Emerson v. Fleming*, 246 Ill. 353, 92 N. E. 890.

See *Guilford v. Mason*, 22 R. I. 422, 48 Atl. 386, the optionor evading, technical common law tender was held unnecessary, the optionee being ready, etc., under an option by its terms requiring payment as an act of election.

*Schaeffer v. Coldren*, 237 Pa. 77, 85 Atl. 98, Ann. Cas. 1914B, 195, where optionor was at home and optionee was not able to gain admission, the court saying that it has been frequently held that acts in themselves, insufficient to make a complete tender, may operate as proof of readiness to perform so as to protect the rights of the optionee when proper tender is made impossible by reason of circumstances not due to the fault of the optionee.

A vendor who intentionally avoids giving the purchaser an opportunity to make a tender, may not thereafter in a suit by the purchaser for specific performance be heard to complain of the absence of a tender, *Connely v. Haggarty*, 68 N. J. Eq. 794, 64 Atl. 1133; see *Ebert v. Arends*, 190 Ill. 221, 60 N. E. 211.

ment or tender of the price until a few days after the expiration of the time limit, owing to the absence of the optionor, but makes tender immediately upon his return, the delay will be excused, the optionee having made improvements.<sup>2</sup> In another case, a lessee under a lease with option to purchase, entered into possession and made improvements, but was unable to make payment of the price until a few days after it was due because of the absence of the lessor. Upon return of the lessor ten days later, the lessee tendered the purchase money and demanded a deed, and it was held time of payment was not of the essence of the contract and that equity would compel specific performance at the suit of the lessee.<sup>3</sup>

SEC. 934. TIME OF PAYMENT. WAIVER ARISING UNDER OPTIONS LIKE “FIRST REFUSALS.”—Where the optionee has a “refusal” of the land at a price as low as any other *bona fide* offer for it, and the optionor sells the land to a third person without giving the optionee the refusal thereof, a tender of the price by the optionee is not essential to a suit for specific performance, an offer to pay the amount the optionor received for the land being sufficient, as it was the duty of the optionor to make known to the optionee

<sup>2</sup> *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539, in this case the court ruled payment and delivery of deed were concurrent acts, see *Guilford v. Mason*, *supra*; *Holmes v. Myles*, 141 Ala. 401, 37 So. 588; *Clark v. Sears*, 3 Iowa 104.

<sup>3</sup> *Wilson v. Herbert*, 76 Md. 489, 25 Atl. 685.

the offer of the third person, a duty which he failed to perform.<sup>1</sup>

In another case, an option was given to purchase the property at any price that might be offered by a third person. The optionor sold the land without giving the optionee notice or an opportunity to purchase. It appeared the optionee was able, etc., to purchase, and would have done so, if he had been given an opportunity. The optionee brought suit to recover damages for breach of the contract, alleging in his complaint the above facts, and it was held, in effect, that election or tender was not necessary to maintain the suit.<sup>2</sup>

SEC. 935. TIME OF PAYMENT. WAIVER BY ONE JOINT OPTIONOR.—The refusal to convey by one of several heirs who has succeeded to the optioned property, and to whom notice of election has been given, waives the necessity of tendering the price.<sup>1</sup> Likewise, the refusal of one of two persons jointly contracting to purchase stock, to purchase and pay for it, when the stock is tendered to him for purchase, is a tender to and refusal by both.<sup>2</sup>

Notice by the seller of stock under an agreement by him to repurchase, to one of the joint pur-

<sup>1</sup> *Cummings v. Nielson*, 42 Utah 157, 129 P. 619.

<sup>2</sup> *Pearson v. Horne*, 139 Ga. 453, 77 S. E. 387.

<sup>1</sup> *Rockland etc. Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, Ann. Cas. 1913B, 62; also *Kerr v. Purdy*, 51 N. Y. 629, reversing 50 Barb. 24.

<sup>2</sup> *Hoover v. Wolfe*, 167 Cal. 337, 139 P. 794; see *Williams v. Patrick*, 177 Mass. 160, 58 N. E. 583.

chasers, of a repudiation of the agreement, is available as a waiver by the other joint purchaser.<sup>3</sup>

Under a power conferred upon two executors to sell land, the power must be exercised by them jointly and hence a waiver of tender by one does not bind the other.<sup>4</sup>

SEC. 936. TIME OF PAYMENT. WAIVER. EFFECT OF ENCUMBRANCES, DOWER RIGHT, ETC.—A strict tender is not necessary where there is an outstanding right of dower in the widow of the optionor as the amount to be tendered can not be known without a judgment of a court of law.<sup>1</sup> In another case, from the same state, the lessee-optionee elected to purchase by making costly permanent improvements, and was ready with the money to make the tender, but did not do so because the premises were encumbered by a dower right and by mortgage, and also because one or more of the heirs of the lessor had previously declared their intention not to execute a deed under the belief that they were not obligated to do so, and it was held that a strict tender was not necessary.<sup>2</sup>

SEC. 937. TIME OF PAYMENT. DEATH OF OPTIONOR.—Where the optionor dies before the expiration of the time limit, the filing of a suit for

<sup>3</sup> *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869.

<sup>4</sup> *Trogden v. Williams*, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867.

<sup>1</sup> *Rockland etc. Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, Ann. Cas. 1913B, 62, s. c. 117 N. Y. S. 405, 133 App. Div. 379.

<sup>2</sup> *Kerr v. Purdy*, 51 N. Y. 629, reversing s. c. 50 Barb. 24.

specific performance by the optionee a few days before the expiration of the time limit, offering in the bill to pay the stipulated option price, is a substantial compliance by the optionee, and the fact that the money was not paid upon the tender is immaterial.<sup>1</sup>

SEC. 938. TIME OF PAYMENT. ACCIDENT AND MISTAKE.—Where the lessee was prevented from giving notice to renew the lease within the stipulated time, by reason of unavoidable accident and physical injury, but served it at the earliest opportunity, and the lessee suffered no loss from delay, equity will grant specific performance of the covenant to renew, notwithstanding time was expressly made of the essence of the covenant.<sup>1</sup>

The optionee lost his duplicate copy of the agreement and, in a conversation with the optionor prior to the expiration of the stipulated time, the optionor stated the time was later than it was in fact. It was held the optionee was not excused of his failure to make payment at the time fixed, it not appearing the optionee applied to the optionor for inspection of the contract in his possession, or made any effort to ascertain the date when the money was payable;<sup>2</sup> but specific performance was granted in a case where the delay was caused by

<sup>1</sup> Maughlin v. Perry, 35 Md. 352.

<sup>1</sup> Monihon v. Wakelin, 6 Ariz. 225, 56 P. 735; Ahl v. Johnson, 1 Minn. 215; in *re* Moore's Estate, 191 Pa. 600, 43 Atl. 474, sickness.

<sup>2</sup> McKenzie v. Murphy, 31 Colo. 274, 72 P. 1075.

mistake of the vendee in entering the wrong date for payment in a calendar of his engagements.<sup>3</sup>

SEC. 939. TIME OF PAYMENT. WAIVER UNDER AGREEMENT FOR EXTENSION.—

Where plaintiff did not pay the full price (\$100) within the fixed time but did pay \$90, and defendant extended the time to pay the \$10 until the next day, an offer the next day to pay the balance will be good and will entitle plaintiff to specific performance.<sup>1</sup> If the vendee is induced by a subsequent oral agreement for extension of the time of payment, to make default in payment as called for by the written agreement, the vendor can not, in equity, invoke the statute of frauds (requiring the extension to be in writing) in order to make the oral agreement invalid,<sup>2</sup> and, generally, where the optionor agrees to extend the time for performance and puts the optionee off his guard, the optionor will be estopped from taking advantage of non-performance by the optionee within the time

<sup>3</sup> *Shipman v. Cummins*, 65 Hun. 620, 19 N. Y. S. 974.

<sup>1</sup> *Gira v. Harris*, 14 S. D. 537, 86 N. W. 624. The court said: "The defendant, after giving plaintiffs to understand that he would accept the money in the morning, can not in justice and equity, be permitted to now say that the full amount was not tendered on the 7th, for the presumption may be reasonably indulged in that, had not the plaintiffs been misled by the conduct of the defendant, they could and would have procured, and tendered the balance on the evening of the 7th."

<sup>2</sup> *Kingsley v. Kressley*, 60 Ore. 167, 118 P. 678, Ann. Cas. 1913E 746; see *Alston v. Connell*, 140 N. C. 485, 53 S. E. 292; *Kingston v. Walters*, 16 N. M. 59, 113 P. 594; *Spolek v. Hatch*, 21 S. D. 113, 113 N. W. 75; *Bowman v. Banks*, 83 Ark. 524, 104 S. W. 209.

first agreed upon, and the optionee will have the extended time within which to perform.<sup>3</sup>

A lessee supposing that his option to purchase ran to March 24, 1887, applied to the assignee of the lessor's interest, prior to March 1, 1887, for an extension for two years. The latter agreed to give him an answer March 7, 1887. On that day the lessee tendered the amount stipulated in the lease as the price, and it was held specific performance would be decreed whether or not the assignee knew the option expired March 1, 1887.<sup>4</sup>

Statement by a vendor to the attorney of the vendee in default, that the deed could be found at his office, if the vendee concluded to waive certain objections, is an extension of time to complete the contract.<sup>5</sup>

**SEC. 940. TIME OF PAYMENT. WAIVER. EFFECT OF POSSESSION AND IMPROVEMENTS BY OPTIONEE.**—Possession of the land by the optionee, or its improvement by him, is, in certain cases, sufficient to excuse delay in payment, that is, to prevent forfeiture.<sup>1</sup>

<sup>3</sup> Longfellow v. Moore, 102 Ill. 289; also Bourke v. Kissack, 242 Ill. 233, 89 N. E. 990.

<sup>4</sup> Keyport Brick etc. Co. v. Lorillard, (N. J. Eq.) 19 Atl. 381, affirmed, 48 N. J. Eq. 295, 22 Atl. 203, the facts show the lessor encouraged the belief that the lessee was not required to exercise his option until the mistaken day, and thus brought the case within the equitable doctrine of estoppel.

<sup>5</sup> Marx v. Oliver, 246 Ill. 316, 92 N. E. 864.

<sup>1</sup> See Raddatz v. Florence Inv. Co., 147 Wis. 636, 133 N. W. 1100; Stafford v. Richard, 121 La. 76, 46 So. 107; Bowman v. Banks, 83 Ark. 524, 104 S. W. 209.



Thus, where, by the terms of the option, the optionee is given the right to the possession of the land for the purpose of constructing a railroad, and by the terms of which it is to run trains within a year, and it has taken possession and constructed the railroad and run its trains within the year, time is no longer of the essence of the contract, and the railroad is entitled to a deed upon tender of the price after the expiration of the year, the payment of the price and delivery of the deed being concurrent acts.<sup>2</sup>

But, where an option permitted the optionees to enter and take possession upon the execution of the contract and to retain possession so long as they complied with the conditions of the option, the possession thereunder was a mere license until they performed the option contract, so that their failure to make the first payment thereunder operated as a surrender of their right of possession.<sup>3</sup>

**SEC. 941. TIME OF PAYMENT. WAIVER. EFFECT OF PART PERFORMANCE.**—When the optionee has entered into possession of the lands and has paid nine-tenths of the price and

<sup>2</sup> *Byers v. Denver C. R. Co.*, 13 Colo. 552, 22 P. 951, the optionor did not tender a deed within the two years.

<sup>3</sup> *Kingsley v. Kressly*, 60 Ore. 167, 118 P. 678, Ann. Cas. 1913E 746; also *Champion etc. Co. v. Champion Mines*, 164 Cal. 205, 128 P. 315, tender after default unavailable.

See *Martin v. Morgan*, 87 Cal. 203, 25 P. 350, 22 A. S. R. 240, holding building, plowing, planting, etc., not sufficient; payment or election not having been made. The case should have turned on the point that election was not in time.

has tendered the balance of the price due, the optionee will not be denied specific performance, because of delay in payment, time, under the circumstances, not being the essence of the contract.<sup>1</sup>

Where the optionee has performed part of the terms of the option and is in possession and is ready and able to complete the purchase according to the terms of the option, he can not be ejected by the optionor, failure of performance being attributable to him.<sup>2</sup>

Where an optionee failed to elect upon which plan he would purchase, as provided in the option, and failed to perform, specific performance will not be granted though he has paid part of the purchase money and made improvements.<sup>3</sup> In this case suit was brought long after the land had been sold to another person and no contract of purchase was in fact ever made.

SEC. 942. TIME OF PAYMENT. TENDER IN PLEADINGS AND MISCELLANEOUS CASES.—Tender of the balance of the purchase money within the stipulated time and a continuing tender in the bill for specific performance, is sufficient.<sup>1</sup>

<sup>1</sup> *Cramer v. Mooney*, 59 N. J. Eq. 164, 44 Atl. 625.

<sup>2</sup> *Bogle v. Jarvis*, 58 Kan. 76, 48 P. 558.

<sup>3</sup> *Blanchard v. Jackson*, 55 Kan. 239, 37 P. 986.

Specific performance of an oral option to fix division line when partly performed and parties are in possession, allowed, *Calanchini v. Branstetter*, 84 Cal. 249, 24 P. 149.

Irreparable injury, *O'Connor v. Harrison*, 132 Ill. App. 264.

<sup>1</sup> *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; see Sec. 1233.

And in such case it is not necessary, as a general rule, that the money should be paid into court,<sup>2</sup> but there may be special circumstances which will induce the court to order the money paid in.<sup>3</sup>

SEC. 943. EFFECT OF PAYMENT OR TENDER.—In an ordinary bilateral contract for the payment of money, payment in accordance with the terms of the contract is a discharge of the debtor from the contract, since it constitutes a full and complete performance on the part of the debtor. A tender of money under such contract and refusal of the creditor to receive it, do not, however, work a discharge of the contract since the tender and refusal constitute an incompleated performance, in that the creditor is still entitled to the amount tendered. The effect of the tender, however, is to place the creditor in default and to prevent him from recovering more than the amount tendered, if the tender is well made.

There is another general rule that a tender or offer by a promisor to do some act other than the payment of money, and a refusal by the promisee, to accept the performance, is a discharge of the promisor from the contract, in the sense that he has fully performed. These general rules apply to option contracts. The last is applicable to a case where payment of the price is the act of election or is to be made concurrently with the election and as a part thereof. In such case tender or payment

<sup>2</sup> *Kerr v. Hammond*, 97 Ga. 567, 25 S. E. 337; *Tyler v. Onzts*, 93 Ky. 331, 20 S. W. 256.

<sup>3</sup> *Cheney v. Wagner*, 33 Neb. 310, 50 N. W. 13; *Binns v. Mount*, 28 N. J. Eq. 24.

is a full and complete performance on the part of the optionee and raises the option to a binding promise on the part of the optionor to convey, whether or not the optionor refuses to accept performance.

The other rules apply to tender or payment of the price under a contract already raised by the election.

## CHAPTER X

### CONVEYANCE OF TITLE.

- Sec. 1001. Generally.
- Sec. 1002. Tender of deed. Whether duty on optionor or optionee.
- Sec. 1003. Time of conveyance. Payment of price and execution of deed as mutual and dependent covenants.
- Sec. 1004. Form and sufficiency of deed.
- Sec. 1005. Title and sufficiency.
- Sec. 1006. Encumbrances.
- Sec. 1007. Approval of title by optionee or by his attorney.
- Sec. 1008. Abstracts, certificates and surveys.

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**SECTION 1001. GENERALLY.**—By a timely and sufficient election and notice there arises, as we have seen, an agreement binding the optionor to convey the optioned property and also binding the optionee to pay the purchase money, at the suit of the optionor, if the election is in form to meet the requirements of the Statute of Frauds.<sup>1</sup> If the optionor, now vendor, upon receiving the purchase money, performs the agreement on his part and executes his deed of conveyance in accordance with the terms of the agreement thus raised, the agreement is discharged. The decisions bear witness, however, that disputes arise with respect to the form and sufficiency of the deed of conveyance, the title of the vendor as being marketable and free, and other like questions which are presented in the following sections of this chapter.

**SEC. 1002. TENDER OF DEED. WHETHER DUTY ON OPTIONOR OR OPTIONEE.**—The rule with reference to the preparation and tender of the deed of conveyance varies in the several states. In England the prevailing rule is that it is the duty of the purchaser to prepare and tender the deed, to the vendor, and this rule has been followed in some of the states of the United States.<sup>1</sup> In most of the other states, the general rule is that it is the duty of the vendor to prepare and tender his deed.<sup>2</sup> But in those jurisdictions where the

<sup>1</sup> *Green River C. Min. Co. v. Brown*, 140 Ky. 332, 131 S. W. 13.

<sup>1</sup> See *Miller v. Cameron*, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554.

<sup>2</sup> *Taylor v. Longworth*, 14 Pet. (U. S.) 172, 10 L. Ed. 405; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501.

duty of preparing and tendering the deed falls on the optionee, the refusal of the optionor to execute any deed, excuses tender of one by the optionee.<sup>3</sup>

The optionor is not required to have his deed ready for delivery on the very day the option expires; he may wait until he is notified by the optionee that he intends to conclude the purchase, and he has a reasonable time within which to prepare and deliver his deed.<sup>4</sup>

The duty of the optionor to prepare and tender his deed arises only upon tender of the price by optionee, election having been made and notice given. The fact that the optionor fails to tender a deed does not excuse tender of the price.<sup>5</sup> Where the duty to prepare and present the deed is on the optionor, the fact that the optionee tendered a deed to the optionor which contained a provision not authorized by the option, can not avail the optionor.<sup>6</sup> Where, however, the optionee takes the

<sup>2</sup> The English rule does not prevail in Ohio, *Taylor v. Longworth*, *supra*, or in the following states: Illinois, *Rohling v. Thole*, 256 Ill. 425, 100 N. E. 138; North Carolina, *Phelps v. Davenport*, 151 N. C. 22, 65 S. E. 459; Iowa, *Consolidated Coal Co. v. Findley*, 128 Iowa 696, 105 N. W. 206; Georgia, *Wellmaker v. Wheatley*, 123 Ga. 201, 51 S. E. 436; Massachusetts, *Boston etc. Ry. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498; Michigan, *De Grasse v. Verona Min. Co.*, (Mich.) 152 N. W. 242, on options.

<sup>3</sup> *Bell v. Wright*, 31 Kan. 236, 1 P. 595; *Phelps v. Davenport*, 151 N. C. 22, 65 S. E. 459.

<sup>4</sup> *Lumaghi v. Abt*, 126 Mo. App. 221, 103 S. W. 104.

See where the option is to repurchase, *Connolly v. Keenan*, 87 N. Y. S. 630, 42 Misc. Rep. 589; *Mundy's Ex'rs v. Garland*, 116 Va. 922, 83 S. E. 491.

<sup>5</sup> *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755, optionor not required to "hunt up" optionee; *Carpenter v. Thornburn*, 76 Ark. 578, 89 S. W. 1047, lease and option; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

<sup>6</sup> *Consolidated Coal Co. v. Findley*, 128 Iowa 696, 105 N. W. 206.

preparation of the deed, which by the terms of the option the optionor was required to prepare and tender, out of his hands and prepares a deed materially modifying the option, the optionor was not required to prepare and tender the deed, and the failure of the optionee to do so ended the option.<sup>7</sup>

A provision in an option to purchase land specifying the time after acceptance within which the deed should be delivered, is not of the essence of the contract unless it is made material by express stipulation, or by circumstances such as change of conditions, which would render the enforcement of the contract inequitable, and hence a failure to tender performance within the time named is not a defense to a suit for specific performance.<sup>8</sup>

Where, on the last day of the option time, the optionor tenders a deed and demands the purchase money, delay of the optionee in paying the price will not enable the optionor to rescind where the optionee objects to what he claims are defects in the title.<sup>9</sup>

Where a contract for the sale of land, for a certain sum, is payable in installments, and is silent as to time of delivery of the deed, it should be tendered before action can be brought on a note given for one of the installments.<sup>10</sup>

Where the grantee of land was given the option to resell to the grantor, the duty is on the grantee

<sup>7</sup> *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171.

<sup>8</sup> *Boston etc. R. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498; see *Penn Min. Co. v. Smith*, 207 Pa. 210, 56 Atl. 426.

<sup>9</sup> *Penn Min. Co. v. Smith*, 210 Pa. 49, 59 Atl. 316.

<sup>10</sup> *Menzel v. Primm*, 6 Cal. App. 204, 91 P. 754.



to prepare and tender deed of reconveyance, and it is not sufficient merely to write that he wished to exercise his option, without tendering a deed, and a tender of the deed after expiration of the option time is too late.<sup>11</sup>

A provision in an option agreement that the optionor will, on demand of the optionee, execute his deed, does not render the option inequitable on the ground that it enables the optionee to postpone indefinitely his demand and thus delay performance. In such case the demand must be made within a reasonable time.<sup>12</sup>

SEC. 1003. TIME OF CONVEYANCE. PAYMENT OF PRICE AND EXECUTION OF DEED AS MUTUAL AND DEPENDENT COVENANTS.—The time after election specified in an option for delivery of the deed, is not of the essence of the contract unless made so by express stipulation, or by circumstances indicating that it was deemed essential by the parties, or there is a change of conditions, after the time fixed for the performance which renders the enforcement of the contract inequitable.<sup>1</sup>

If, by the terms of the option contract, no time is expressly fixed for the execution and delivery of the deed of conveyance, it must be executed and

<sup>11</sup> *Curtis v. Sexton*, 142 Mo. App. 179, 125 S. W. 806, also holding that the place of tender was at residence of optionor which was the place where the land was situated and where the contract was to be performed.

<sup>12</sup> *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522.

<sup>1</sup> *Boston & W. St. Ry. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498.

delivered within a reasonable time.<sup>2</sup> And where, by the terms of the option, express or implied, the execution of the deed and payment of the price are concurrent acts, then upon payment or tender of the price, it becomes the duty of the optionor to execute his conveyance, or where the price is payable in installments, to execute his conveyance upon payment or tender of the last installment.<sup>3</sup>

It may be stated as a general rule that if the option agreement does not otherwise provide, the obligation of the optionee to make payment of the price and the obligation of the optionor to make title, are mutual and dependent covenants, and that neither party is in default until put in default by offer of performance by the other.<sup>4</sup>

Thus, where the owner of coal lands agreed to sell the same for a certain sum per acre, payable one-third on delivery of deed, within three months

<sup>2</sup> *Houghwout v. Boisabuin*, 18 N. J. Eq. 315; *Reynolds v. O'Neil*, 26 N. J. Eq. 223.

<sup>3</sup> *Woodruff v. Semi-Tropic Land etc. Co.*, 87 Cal. 275, 25 P. 354; *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637; *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. 255; see decisions Note 5, this section.

<sup>4</sup> *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249; *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. 255; *Stein v. Leeman*, 161 Cal. 502, 119 P. 663, affirming 90 P. 536; *Joyce v. Tomasini*, 168 Cal. 234, 142 P. 67; *Gantt v. Mechin*, 30 Mo. App. 532, claim against estate of lessee; *Kessler v. Pruitt*, *infra.*; *Barnes v. Rea*, 219 Pa. St. 279, 68 Atl. 836; *Stevens v. Kittredge*, 44 Wash. 347, 87 P. 484.

*Brown v. Slee*, 103 U. S. 828, 26 L. Ed. 618, holding that the failure of both parties to perform on the day fixed is equivalent to a waiver by each of the default of the other. Thereafter either could require the other to perform within a reasonable time, first curing his own default. See *Houghwout v. Boisabuin*, 18 N. J. Eq. 315, holding either party has a reasonable time; also *Lumaghi v. Abt*, 126 Mo. App. 221, 103 S. W. 104.

As to rule of construction, see *Fullenwider v. Rowan*, 136 Ala. 287, 34 So. 975.

from date, and the balance in subsequent payments, the agreement providing that if the payment was not made as stipulated it should be void, etc., the owner can not claim a forfeiture for failure to make first payment where he failed to tender a deed within the time fixed.<sup>5</sup>

It must be kept in mind that to entitle the optionee to invoke the rule, it is essential that he exercise his right of election and give notice, and that it is, therefore, only in those cases where payment of the price is not part of the act of election that the rule applies.<sup>6</sup>

**SEC. 1004. FORM AND SUFFICIENCY OF DEED.**—The optionee is entitled to a deed of conveyance, describing the land in the words of the agreement without any limitations other than those therein agreed on.<sup>1</sup> Where the optionor is a mar-

<sup>5</sup> *McHenry v. Mitchell*, 219 Pa. 297, 68 Atl. 729; see *Phelps v. Davenport*, 151 N. C. 22, 65 S. E. 459; *Knerr v. Bradley*, 105 Pa. St. 190; *Barnes v. Rea*, 219 Pa. 279, 68 Atl. 836; *Kibler v. Caplis*, 140 Mich. 28, 103 N. W. 531, 112 A. S. R. 388; *Kessler v. Pruitt*, 14 Idaho 175, 93 P. 965, abstract; *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220, overruling *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Byers v. Denver C. R. Co.*, 13 Colo. 552, 22 P. 951; *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; *Flynn v. White Breast Coal Co.*, 72 Iowa 738, 32 N. W. 471.

<sup>6</sup> *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171; *Bowen v. McCarthy*, 85 Mich. 26, 48 N. W. 155.

See, however, *Guilford v. Mason*, 22 R. I. 422, 48 Atl. 386, where in an action to recover damages against optionor for fraud, it is said that tender of payment which was the act of election was excused where the optionor evaded.

Rule in action at law to recover back money invested under option to sell interest of optionee to other parties in venture, *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53.

<sup>1</sup> *Waters v. Bew*, 52 N. J. Eq. 787, 29 Atl. 590.

ried woman, tender of a deed by the optionee for execution wherein both husband and wife are made grantors, does not imply a demand for a deed from the husband in the sense that demand is made a condition to the acceptance of the same by the optionee.<sup>2</sup>

Where the option provides for a warranty deed free of all encumbrances, there being no suggestion that the construction of a cement tank and the maintenance of it and of pipes were to be secured by making them conditions subsequent in the deed though the optionee agreed to perform those acts, the right of the optionor will be properly secured by inserting agreements in the deed binding on the grantee and its successors and assigns instead of by conditions the breach of which would work a forfeiture.<sup>3</sup>

Where, by the terms of the option, tender of deed and payment of price are concurrent acts, the fact that the optionee tendered a deed containing provisions not authorized by the option can not avail the optionor who was required to present the deed himself.<sup>4</sup> Objections to the form of deed prepared by the optionee are immaterial when the optionor absolutely refuses to accept the purchase money or to execute any deed, even assuming that the duty

<sup>2</sup> *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118.

<sup>3</sup> *Boston etc. R. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498.

A contract calling for a deed with full covenants of warranty is complied with if such warranty appears in the chain of title and runs with the land, beginning with the grantor, *Big Ben L. Co. v. Hutchings*, 71 Wash. 345, 128 P. 652.

<sup>4</sup> *Consolidated Coal Co. v. Findley*, 128 Iowa 696, 105 N. W. 206.

of preparing and tendering the deed was on the optionee.<sup>5</sup> Failure of the optionor to object to a deed tendered by the optionee because it contained too much land is waived if not objected to on that ground at the time.<sup>6</sup>

#### SEC. 1005. TITLE AND SUFFICIENCY.—

Where the option does not specify what estate shall be granted it calls for an estate in fee simple,<sup>1</sup> unless it appears that the parties intended to contract on the basis of a lesser estate.<sup>2</sup>

The optionee can not require the optionor to “clear up” her title,<sup>3</sup> but the optionee has the right to demand evidence of title as a condition precedent to further performance on his part.<sup>4</sup>

The general rule is, however, that specific performance will not be decreed against an optionor who is not able, for want of title, to comply with the option contract.<sup>5</sup>

<sup>5</sup> *Chadsey v. Condley*, 62 Kan. 853, 62 P. 663.

<sup>6</sup> *Schroeder v. Gemeinder*, 10 Nev. 355.

<sup>1</sup> *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25; *Florida Yacht Club v. Renfroe*, 67 Fla. 154, 64 So. 742; *Taylor v. Newton*, 152 Ala. 459, 44 So. 583.

“Satisfactory” title, what is, *Dillinger v. Ogden*, 244 Pa. 20, 90 Atl. 446, Ann. Cas. 1915C, 533.

<sup>2</sup> *Lounsbery v. Locander*, 25 N. J. Eq. 554; *Brink v. Mitchell*, 135 Wis. 416, 116 N. W. 16.

<sup>3</sup> *Friendly v. Elwert*, 57 Ore. 599, 105 P. 404, 112 P. 1085, Ann. Cas. 1913A, 357.

<sup>4</sup> *Taylor v. Newton*, 152 Ala. 459, 44 So. 583; *Welchman v. Spinks*, 5 L. T. Rep. (N. S.) 385.

<sup>5</sup> *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522.

Where the title is to be free from incumbrances, the optionee can insist upon a deed free of restrictive covenants.<sup>6</sup>

The optionee is entitled to a good title and the fact that he declined a deed and to pay the price on a ground plausible enough to cause a prudent man to hesitate, does not defeat his right to specific performance, although it turns out there is no defect.<sup>7</sup>

If the title of the optionor fails, the optionee may rescind and recover the purchase money paid, whether or not the optionor knew he had title, and the option is not invalid because the optionor had no title at the time of the execution of the option,<sup>8</sup> but if the optionor has not the title at the time of the execution of the option and failed to obtain it within the option time, he is not entitled to specific performance.<sup>9</sup>

The optionee may not raise the question of sufficiency of title when he has not elected so as to convert the option into an agreement of sale and purchase, although he knew, when the option was executed, that the optionor had only a "bond" for a deed.<sup>10</sup>

<sup>6</sup> *Krah v. Radcliffe*, 78 N. J. Eq. 305, 81 Atl. 1133, affirming *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404.

But not where the option restricts the use of the property for 20 years, and the optionor is entitled to have such restriction inserted in the deed, *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619, 27 C. C. A. 634.

<sup>7</sup> *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

<sup>8</sup> *Burks v. Davies*, 85 Cal. 110, 24 P. 613, 20 A. S. R. 213.

<sup>9</sup> *North Ave. L. Co. v. City of Baltimore*, 102 Md. 475, 63 Atl. 115.

<sup>10</sup> *Kingsley v. Kressly*, 60 Ore. 167, 118 P. 678, Ann. Cas. 1913E, 746; see *Winter v. Bostwick*, 172 Fed. 285.

The fact that one of the deeds under which the optionor derives his title contains a misdescription of the property resulting from a mistake on the part of a draughtsman, affords no ground for a reasonable objection.<sup>11</sup> The optionor is permitted to make good title if possible within a reasonable time.<sup>12</sup>

**SEC. 1006. ENCUMBRANCES.**—A lease is not an encumbrance upon the premises under an option to purchase the same land contained in the lease.<sup>1</sup>

Where an optionee exercises his right of purchase and gives notice within the stipulated time, the optionor can not, at the expiration of the option time, by tendering deed and demanding payment declare the contract null and void if payment is not then made, because the optionor can not then change the contract by making time of its essence, it appearing that at the time of the tendering of the deed there was a lien on the property.<sup>2</sup>

And where the premises are covered by a prior mortgage as to which no provision is made in the

<sup>11</sup> *Brown v. Reichling*, 86 Kan. 640, 121 P. 1127.

<sup>12</sup> *Burks v. Davies*, 85 Cal. 110, 24 P. 613, 20 A. S. R. 213.

When improvements burn, *Clark v. Burr*, 85 Wis. 649, 55 N. W. 401.

May not have conveyance of part of the premises, *Hitchcock v. Page*, 14 Cal. 440.

Facts not amounting to warranty, *Worthington v. Herrmann*, 180 N. Y. 559, 73 N. E. 1134, affirming 88 N. Y. S. 76, 89 App. Div. 627.

Fixing boundaries of reserved tract before optionee becomes entitled to a deed, is in time, *Rouse v. Riverton Coal & Dev. Co.*, 154 Ore. 71, 142 P. 343.

<sup>1</sup> *Swanston v. Clark*, 153 Cal. 300, 95 P. 1117; see *Millard v. Martin*, 23 R. I. 494, 68 Atl. 420.

<sup>2</sup> *Penn Min. Co. v. Smith*, 207 Pa. 210, 56 Atl. 426.

option, the optionee, at his election, has the right either to insist on a good title and refuse to exercise the option, if it is not offered, or to accept such title as the vendor has and demand an adjustment of the payment of the purchase price in such manner as may be just to protect him, as far as may be, against loss from defects in the title.<sup>3</sup>

Where, after the execution of an option contained in a lease, the city in which the property is situated, paved a side street in front of the optioned premises (not anticipated by the parties) the court, in specific performance, is warranted in requiring the optionee to reimburse the optionor for the amount already paid for paving and to assume the balance as a condition of granting specific performance.<sup>4</sup>

Where time of performance is not specified by the option and the parties arrange for the removal of an encumbrance, prior to performance, without naming a specific day, the removal within a reasonable time is sufficient performance.<sup>5</sup>

**SEC. 1007. APPROVAL OF TITLE BY OPTIONEE OR BY HIS ATTORNEY.**—Where, by the terms of the option, the title is to be satisfactory to the attorney of the optionee, the decision of the attorney, in the absence of bad faith

<sup>3</sup> *Smiddy v. Grafton*, 163 Cal. 16, 124 P. 433, Ann. Cas. 1913E, 921.

Case where optionor was permitted to mortgage, *Bennett v. Giles*, 220 Ill. 393, 77 N. E. 214.

May have an abatement of the price even if he knew of the defect when he began suit, *White v. Weaver*, 68 N. J. Eq. 644, 61 Atl. 25.

<sup>4</sup> *King v. Raab*, 123 Iowa 632, 99 N. W. 306.

<sup>5</sup> *Cramer v. Mooney*, 59 N. J. Eq. 164, 44 Atl. 625.



on his part, is conclusive on that question though the title in fact is good,<sup>1</sup> and such stipulation is not void as unreasonable in providing that if the optionee should decline to take title the moneys paid on the price should be refunded to the optionee.<sup>2</sup>

A provision in an option giving the optionee the right to pass on or reject the title and making him the exclusive judge of the sufficiency of the title, if acted on in good faith, passes by assignment of the option. In this case, however, the optionor after demand, delivered certificate of title to the assignee of the optionee.<sup>3</sup>

When investigation of title is made within the stipulated time and is found regular, the failure of the optionee, at the end of the time, to pay the purchase money, will bar specific performance, the title being regular and time being of the essence.<sup>4</sup>

**SEC. 1008. ABSTRACTS, CERTIFICATES AND SURVEYS.**—The duty of the optionor to furnish an abstract or certificate of title is one arising solely from the terms of the option contract except perhaps in those localities or jurisdictions where there is a general custom imposing this duty upon the optionor.<sup>1</sup>

<sup>1</sup> *Friendly v. Elwert*, 57 Ore. 599, 105 P. 404, 112 P. 1085, Ann. Cas. 1913A, 357.

<sup>2</sup> *DeLano v. Saylor*, (Ky.) 113 S. W. 888.

<sup>3</sup> *Simmons v. Zimmerman*, 144 Cal. 256, 79 P. 451, 1 Ann. Cas. 850.

<sup>4</sup> *Hollmann v. Conlon*, 143 Mo. 369, 45 S. W. 275.

<sup>1</sup> See *Doran v. Bunker Hill Oil Min. Co.*, 23 Cal. App. 644, 139 P. 93; *Knox v. McMurray*, 159 Iowa 171, 140 N. W. 652; *Con. Coal Co. v. Findley*, 128 Iowa 696, 105 N. W. 206; *Thompson v. Robinson*, 65 W. Va. 506, 64 S. E. 718, 17 Ann. Cas. 1109.

Stipulations in an option binding the optionor to furnish optionee an abstract of title to the premises showing good and clear title, and binding the optionee to pay the balance of the purchase money, are mutual, dependent and concurrent covenants, and neither party can be put in default without tender of performance by the other.<sup>2</sup>

The rule, it must be remembered, applies to the performance of the contract and not to an election to purchase under the option. An election is necessary to raise the option to an agreement of purchase and sale, and, therefore, the failure of the optionor to tender an abstract does not excuse tender of the price where the price by the terms of the option is a part of the act of election.<sup>3</sup>

But where the election was made in time and only part of the first installment of the price, required by the option to be paid within thirty days, was paid, and was retained by the optionor as a part of the payment and who thereafter furnished an abstract to the optionee for examination, and by the terms of the option the latter had ten days thereafter within which to examine it, it was held the optionor waived the full payment of the first installment.<sup>4</sup> So, when the optionee elects in time, his failure to tender or pay the price within the time, will not lose him the benefit of the option if the optionor was not able to deliver a deed

<sup>2</sup> *Kessler v. Pruitt*, 14 Idaho 175, 93 P. 965.

*Hessell v. Neal*, 25 Colo. App. 300, 137 P. 72, the case seems to turn on the point that the optionee was not able to make the deferred payment.

<sup>3</sup> *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403.

<sup>4</sup> *Moore v. Beiseker*, 147 Fed. 367, 77 C. C. A. 545.

because of the absence of two persons whose signatures were necessary to the execution of the deed, and where, also, a survey of the land was necessary to determine the acreage.<sup>5</sup>

Delay by the optionor in furnishing an abstract within the stipulated time, does not excuse the optionee for a delay in failing to make payment of the price within the time stipulated, where it appears that the abstract was delivered to the optionee, and that he approved the same before the expiration of the time limit for the payment, and it also appearing that he had time after the approval and before the expiration of the time limit to make the payment.<sup>6</sup>

<sup>5</sup> *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220, overruling *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

<sup>6</sup> *Kentucky etc. Co. v. Warwick Co.*, 109 Fed. 280, 48 C. C. A. 363.

*Con. Coal Co. v. Findley*, 128 Iowa 696, 105 N. W. 206, on difficult facts holds otherwise.

Surveys: Duty to make on optionor as much as on optionee, *Bell v. Wright*, 31 Kan. 236, 1 P. 595, 601.

Where amount agreed on, tender not excused for lack of survey, *Smith v. Miller*, 54 Ind. App. 37, 101 N. E. 316.

Extension of time to make survey and finish contract, *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830.

As to waiver by optionee, see *Lechner v. Strauss*, 50 Ind. App. 414, 98 N. E. 444.

Where the price is fixed at a certain sum per acre and the property is described by metes and bounds as containing 410 acres "more or less," the price must be fixed by the contract and not by the paper acreage, *Warden v. Telsa*, 87 N. Y. S. 853, 93 App. Div. 520.

Statute of limitation does not begin to run till survey, *Calanchini v. Branstetter*, 84 Cal. 249, 24 P. 149.

No title passes till survey, *Little v. Cardwell*, (Ky.) 122 S. W. 799.



## CHAPTER XI.

### REMEDIES.

- Sec. 1101. Remedies of optionor. Generally.
- Sec. 1102. Remedies of optionee. Generally.
- Sec. 1103. Breach of contract. Failure to elect is not breach.
- Sec. 1104. Right of optionee to recover damages without electing where optionor breaches during time limit.
- Sec. 1105. Option cases involving sale and return.
- Sec. 1106. Option cases involving expired options and unaccepted offers.
- Sec. 1107. Cases involving options to sell.
- Sec. 1108. Option cases involving application of payments as rent.
- Sec. 1109. Option cases involving title.
- Sec. 1110. Option cases involving fraud.
- Sec. 1111. Option cases involving liquidated damage clauses.
- Sec. 1112. Option cases involving forfeiture clauses.
- Sec. 1113. Option cases involving "null and void" clauses.
- Sec. 1114. Option cases involving liability of telegraph company for negligent transmission of telegrams.
- Sec. 1115. Miscellaneous cases involving actions under options.
- Sec. 1116. Action by vendor for price under bilateral contract. Real property.
- Sec. 1117. Action by vendor for damages under bilateral contract. Rule of damages.
- Sec. 1118. Action by purchaser for damages under bilateral contract. Rule of damages.
- Sec. 1119. Action for breach of bilateral contract. Personal property. Rules of damages.
- Sec. 1120. Pleading.
- Sec. 1121. Practice.
- Sec. 1122. Evidence.
- Sec. 1123. Ejectment.
- Sec. 1124. Suit to quiet title (remove cloud).
- Sec. 1125. Detainer.
- Sec. 1126. Injunction.

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**SECTION 1101. REMEDIES OF OPTIONOR. GENERALLY.**—The optionee has the contract and the legal right to permit the option privilege to lapse. If he does so the option contract is at an end, that is, fully and completely discharged.<sup>1</sup> The same result attends the surrender or abandonment of the option, by the optionee, as does also the death of the optionee, prior to election, where the privilege is personal to him.

If the option privilege is properly and timely exercised and the optionee then fails or refuses to proceed further with the purchase, whether the optionor has any remedy for the enforcement of the contract against the optionee, depends upon the facts and the law of the particular jurisdiction applicable thereto. If the contract is not within the Statute of Frauds, or if it is within the statute and the election is in writing and subscribed by the optionee so as to meet its requirements,<sup>2</sup> or, if the optionee has otherwise bound himself to perform, the effect is to raise a bilateral contract which is enforceable by the optionor against the optionee, either to recover damages for breach of the contract, to strict-foreclose the contract, or, in certain

<sup>1</sup> *John v. Elkins*, 63 W. Va. 158, 59 S. E. 961; *Stewart v. Gardner*, 152 Ky. 120, 153 S. W. 3, optionee's rights are at an end; *Montgomery v. Waldeck*, 2 Alaska 581.

*Low v. Young*, 158 Iowa 15, 138 N. W. 828, and of course the optionor may not recover damages for not electing; *Booth v. Miliken*, 111 N. Y. S. 791, 127 App. Div. 522; also *Gordon v. Swan*, 43 Cal. 564; *Quigley v. King*, 182 Mo. App. 196, 168 S. W. 285; nor enforce an agreement between agent and principal by which the latter agrees to make the option payments, *Roekwell v. Edgcomb*, 72 Wash. 694, 131 P. 191, nor have specific performance of agreement to work mine, *Geiger v. Green*, (Md.) 4 Gill. 472; see Sec. 871.

<sup>2</sup> See Sec. 417; *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228, 231.

jurisdictions, to enforce specific performance of the contract by a suit which has for its object the recovery of the purchase price.<sup>3</sup> On the other hand, if the election is oral and, therefore, fails to meet the requirements of the Statute of Frauds in a particular jurisdiction,<sup>4</sup> and the optionee has not otherwise bound himself to perform, it would seem the optionor is without remedy even though not in breach of the contract himself, the effect in such case being the same as if there had been no election.<sup>5</sup>

It is not unusual to find an option contract giving possession of the property to the optionee during its time limit, and there are numerous cases involving leases with option to purchase where the lessee-optionee, of course, takes possession. In such cases, upon failure timely and properly to elect, the term of the lease having expired, the optionor has his remedy to recover possession in accordance with the law and the practice of the particular jurisdiction, but usually in form of ejectment,<sup>6</sup> or detainer.<sup>7</sup> In addition to these the optionor has, on proper facts, an action to quiet his title, or a suit to remove

<sup>3</sup> See *Johnston v. Trippe*, 33 Fed. 530; *Obery v. Lander*, 179 Mass. 125, 60 N. E. 378; *Glock v. Howard & W. Colony Co.*, 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 A. S. R. 17; *Cuthill v. Peabody*, 19 Cal. App. 304, 125 P. 926; *O. W. Kerr Co. v. Nygren*, 114 Minn. 268, 130 N. W. 1112; *Green River Coal Min. Co. v. Brown*, 140 Ky. 332, 131 S. W. 13, specific enforcement against optionee to work coal mine.

“Upon election there is an implied obligation to take the property and pay the purchase money,” *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228, 231; also *Thomas v. Brewing Co.*, 102 Md. 417, 62 Atl. 633.

<sup>4</sup> See Sec. 417; *Montgomery v. Waldeck*, 2 Alaska 581.

<sup>5</sup> *Montgomery v. Waldeck*, *supra*; *Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67.

<sup>6</sup> See Sec. 1123.

<sup>7</sup> See Sec. 1125.

the option as a cloud,<sup>8</sup> and is sometimes entitled to an injunction.<sup>9</sup>

SEC. 1102. REMEDIES OF OPTIONEE. GENERALLY.—A breach of the contract by the optionor, after a timely and proper election, gives the optionee an action to recover damages for the breach, or, in a proper case, a suit for specific performance of the contract, or, at his election, a right to recover back the purchase money paid.<sup>1</sup>

If the optionor breaches the option agreement before an election is due, the rights and remedies

<sup>8</sup> See Sec. 1124.

<sup>9</sup> See Sec. 1126.

<sup>1</sup> *Glock v. Howard & W. Colony Co.*, 123 Cal. 1, 55 P. 713, 43 L. B. A. 199, 69 A. S. R. 17.

An option to renew a lease contained therein is a valuable right, and an action for damages will lie for refusal of the landlord to renew, the lessee having elected to renew, *McClintock v. Joyner*, 77 Miss. 678, 27 So. 837, 78 A. S. R. 541.

As to right of optionee-lessee to recover damages for refusal to convey under option in lease void as offending the rule against perpetuities, see *Worthing Corporation v. Heather*, (1906), 2 Ch. Div. 532.

Contract of sale giving plaintiff an option to demand the delivery of goods not exceeding a certain amount, is enforceable on his making the demand, and damages may be recovered for the refusal of the defendant to deliver the goods, *Dambmann v. Lorentz*, 70 Md. 380, 17 Atl. 389, 14 A. S. R. 364.

An optionee in default can not recover payments made, *Bruschi v. Mining Co.*, 147 Cal. 120, 81 P. 404; *Champion Gold M. Co. v. Champion Mines*, 164 Cal. 205, 128 P. 315.

A mortgage or gift of the optioned property by the optionor does not render him liable where the optionee has a "pre-emption right if he (optionor) ever determines to sell," *City of Louisville v. Bank of U. S.*, 42 Ky. (13 B. Mon.) 138.

Sale by optionor not a breach of "first option to purchase," where use of premises is reserved to him during full term of the lease, *Blanchard v. Ames*, 60 N. H. 404.



of the optionee are made to turn on the presence or absence of a timely and proper election by him. If the optionor breaches and, notwithstanding the breach, the optionee timely and properly elects, it is clear he has perfected his right to enforce the bilateral contract thus raised, and has, consequently, the remedies and rights common to such contracts. On the other hand if, in such case, he fails to elect, it would seem his only remedy is to recover damages for breach of the option contract.<sup>2</sup>

The distinction, then, is the difference between the option contract and the bilateral contract. The only remedy of the optionee under the former is an action to recover damages for breach of that contract.<sup>3</sup> Whereas, the remedies of the optionee under an option contract raised to a bilateral contract by election are, either an action to recover damages for the breach, or to recover the purchase money paid, or a suit for specific enforcement of the bilateral contract.<sup>4</sup>

Independently of the presence or absence of an election, either of the parties has, in a proper case, the right to rescind or to reform the contract. The former subject has been presented in a preceding section,<sup>5</sup> and a presentation of the latter will be found in a following section.<sup>6</sup>

<sup>2</sup> See Sec. 1104; the offeree can not recover under a pure offer withdrawn before acceptance, *Hochster v. Baruch*, 5 Daly (N. Y.) 440; nor when he abandons the option and the property, *Darragh v. Vicknair*, 126 La. 171, 52 So. 264; Bankruptcy, see Sec. 709, note 4.

<sup>3</sup> See Sec. 1104.

<sup>4</sup> See Sec. 1118.

<sup>5</sup> See Sec. 712.

<sup>6</sup> See Sec. 1245; also *Gillis v. Arringdale*, 135 N. C. 295, 47 S. E. 429.

SEC. 1103. BREACH OF CONTRACT. FAILURE TO ELECT IS NOT BREACH.—The remedies we are considering are those arising out of breach of the option contract as well as out of the bilateral contract raised by the election. The latter needs no extended presentation since the remedies for the enforcement of such contracts are those applicable to contracts generally. As to breach of the option contract, however, it should be pointed out that the failure of the optionee to exercise the option privilege is not a breach. Breach of contract occurs where a party breaks through the obligation which the contract imposes upon him. An option contract, however, imposes no obligation on the optionee unless and until there is an election binding him to performance.<sup>1</sup> This clearly appears from the one-sided nature of the option contract in that the privilege granted by the option to the optionee is the *right* to permit the option to lapse equally with the *right* on the part of the optionee to elect to purchase. The exercise by a party to a contract of a right granted him by it, is not a

<sup>1</sup> *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; *Gordon v. Swan*, 43 Cal. 564; *Darr v. Mummert*, 57 Neb. 378, 77 N. W. 767; *Peacock v. Deweese*, 73 Ga. 570; *Montgomery v. Waldeck*, 2 Alaska 581.

In *Minn. etc. Ry. Co. v. Columbia etc. Co.*, 119 U. S. 149, 30 L. Ed. 376, 7 S. Ct. 168, it is said that an offer to sell imposes no obligation on either party until accepted according to its terms; also *Huggins v. Safford*, 67 Mo. App. 469; *Atwood v. Rose*, 32 Okl. 355, 122 P. 929.

In consequence of this rule the optionor can not compel the optionee to work ore beds, *Geiger v. Green*, (Md.) 4 Gill. 472, but is otherwise when the covenant to sink the shaft is absolute and is the consideration for the option to purchase, *Davis v. Eames*, (Cal.) 35 P. 566.

There is no contract of purchase or obligation to sell or convey until election, *Tilton v. Sterling C. & C. Co.*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689.

breach.<sup>2</sup> Nor, does a failure by the optionee to elect, give the optionor a right of action to recover a penalty for such failure, under an agreement held to be an option by which the optionor agreed to sell certain land to a railroad for railroad purposes, the agreement providing that if the construction of a railroad across the land was not commenced within a certain time, it should be null and void, and further that if the road was not completed within a certain time, the optionee should pay to the optionor a forfeit or penalty of \$200 for every year the optionor should fail to complete the road. The optionee did not elect, nor was the construction of the road commenced within the time. The optionor brought assumpsit to recover the penalty alleging the above facts. A demurrer to the complaint was sustained and the action dismissed, and these rulings, on appeal, were affirmed.<sup>3</sup>

**SEC. 1104. RIGHT OF OPTIONEE TO RECOVER DAMAGES WITHOUT ELECTING WHERE OPTIONOR BREACHES DURING TIME LIMIT.**—The remedies to be considered in this section are those available to an optionee upon breach by the optionor before the

<sup>2</sup> See *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150, 153; and the same rule applies where the agreement is construed to be an option by virtue of a forfeiture clause, *Low v. Young*, 158 Iowa 15, 138 N. W. 828; *Runck v. Dimmick*, 51 Tex. Civ. App. 214, 111 S. W. 779.

The optionor can not legally insist that the optionee shall elect, *Kelly v. Chicago M. & St. P. Ry. Co.*, 93 Iowa 436, 61 N. W. 957; *Pearce v. Turner*, 150 Ill. 116, 36 N. E. 962; option to sell, *Rockwell v. Edgcomb*, 72 Wash. 694, 131 P. 191.

<sup>3</sup> *John v. Elkins*, 63 W. Va. 158, 59 S. E. 961; see, also, *Quigley v. King*, 182 Mo. App. 196, 168 S. W. 285.

expiration of the option time limit, and in the absence of an election by the optionee to purchase.

The nature of a mere *offer* seems logically to lead to the conclusion that the offeree, in the absence of a timely acceptance of the offer, acquires no right which may be the foundation of a cause of action against the offerer, based upon a withdrawal of the offer, by the latter, prior to acceptance;<sup>1</sup> but an option, as we have seen, is the sale of the right of election to purchase. It is recognized as a property right which, even prior to election, may be the subject of bargain and sale.<sup>2</sup> The optionor expressly or impliedly stipulates not to withdraw the offer of sale during the time limit, and, therefore, if during the time limit he breaches the option agreement by repudiating the option, or by placing himself in a position where it is impossible for him to perform, it would seem the optionee has an action to recover damages arising from breach of the option, although he has not elected.<sup>3</sup>

<sup>1</sup> See *Abbott v. 76 Land & W. Co.*, 101 Cal. 567, 53 P. 445; *Hochster v. Baruch*, 5 Daly (N. Y.) 440; see *Kirby Carpenter Co. v. Burnett*, 144 Fed. 635, 75 C. C. A. 437.

As to a mere offer, whether with or without a time limit, it is not a breach by the optionor to withdraw, before acceptance, and consequently no cause of action arises, see *Hochster v. Baruch*, *supra*.

Of course the optionee has no right of action when the option time limit expires without election, *Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67, and can not, in such case, recover earnest money from the optionor, *Scott v. Merrill's Estate*, (Ore.) 146 P. 99.

<sup>2</sup> See *Haskins v. Ryan*, 75 N. J. Eq. 330, 78 Atl. 566; *Myers v. Metzger*, 61 N. J. Eq. 522, 48 Atl. 1113.

<sup>3</sup> *Pearson v. Horne*, 139 Ga. 453, 77 S. E. 387. The *Pearson* case just cited involved a "first refusal." The optionor sold the optioned property to a third person without giving the optionee an opportunity to purchase—that is, to elect. The optionee brought suit for damages, alleging he was ready, able, etc., to purchase and would have done so if an opportunity had been offered. A demurrer to the

Thus, under an agreement with defendant, a land owner, giving plaintiff the agency to sell certain lands on certain commissions and also granting to

complaint was overruled and the ruling was affirmed on appeal. It will be observed that no election was alleged, and, for the very plain reason that an election could not be made, under this form of option, until the optionee was advised the optionor had decided to sell and of the price offered by the third party. (See *Myers v. Metzger*, 61 N. J. Eq. 522, 48 Atl. 1113.) In *Guilford v. Mason*, 22 R. I. 422, 48 Atl. 386, s. c. 24 R. I. 386, 53 Atl. 284, the option was the ordinary one to purchase shares of stock of a corporation for a price and within a time fixed. The optionee attempted to tender the price by check within the time, payment being the act of election, but the optionor evaded. After the expiration of the option, the optionor refused to transfer the stock and returned the consideration paid for the option. The optionee brought assumpsit, and it was held a strict legal tender of the price (election) was not necessary, and all that was necessary for him to show was a readiness and willingness to perform on his part. It will be observed that an attempt was made to elect within the option time, but was prevented by the optionor. But apart from these decisions, it would seem the breach of an option contract to keep the offer open during the stipulated time does not differ in principle from the breach of any other contract, and that, therefore, if during the time limit, the optionor breaches, as by selling the property to a third person under circumstances showing a repudiation of the option, the idle and useless act of electing is not necessary to entitle the optionor to sue and recover damages for such breach, if an action is brought, or if, as in the *Guilford* case, some act is done by the optionee, before the expiration of the option time limit, to show his intention to enforce the option. If, on the facts stated, the optionee delays his action, or the assertion of his rights under the option, until after the expiration of the time limit, the case is not so clear, for the right of election is lost by lapse of its time limit, unless, in the meantime, the optionee exercises the privilege. This is a general statement of the rule. A distinction can, and perhaps should, be made between the effect of failure to elect, on the right to raise a bilateral contract out of the option, and to enforce a right growing out of breach of the *option contract to keep the offer open*. In the former case, by failure to elect, the optionee loses his right to raise a binding promise on the part of the optionor to sell the property. This seems clear. In the latter case, there is a contract which, from the present point of view, is entirely distinct and separate from the former. An option contract supported by a consideration, and delivered, and otherwise valid, does not require any act on the part of the optionor to keep it alive during its time limit. Election is not necessary to keep the

plaintiff an option to purchase, and providing for certain credits of commissions on the option price in the event of an election to purchase, where the defendant, before the expiration of the option time, breached the option agreement by selling the land to third parties, and plaintiff sued for damages arising from the breach, plaintiff is entitled to recover as damages, the value of the option contract to him, and is also entitled to recover any amount he has paid on the option.<sup>4</sup>

It will be observed that as an option, prior to election, is not a sale, or an agreement to sell the land, the measure of damages is not the difference between the contract price and the market value of the land, the rule obtaining where the optionee has elected, but the damages recoverable are limited to those resulting from breach of the option contract itself,<sup>5</sup> which, however, may be the excess of the

offer open. If this is true, and the optionor breaks his promise to keep the offer open, why may not the optionee, by an action at law, at any time within the period fixed by the Statute of Limitations, enforce his right to damages, if any, growing out of breach of the option contract as distinguished from his right to recover damages for breach of the *bilateral contract* to raise which an election is admittedly necessary in every case (Sec. 702), except those falling within the rule of estoppel, accident, mistake, etc. (See Secs. 864-870.) See *Young v. Matthew Turner Co.*, 168 Cal. 671, 143 P. 1029, 1031.

<sup>3</sup> It is not a breach by the optionor when he bargains the optioned property during the option time only conditionally upon the failure of the optionee to elect, *Smith v. Lawrence*, 98 Me. 92, 56 Atl. 455; see Sec. 702.

<sup>4</sup> *Sixta v. Ontonagon Valley Land Co.*, 157 Wis. 293, 147 N. W. 1042, holding the question is "what does the evidence show the contract was worth to plaintiffs."

<sup>5</sup> *Sixta v. Ontonagon Valley Land Co.*, *supra*; see, also, *Boyd v. DeLancey*, 45 N. Y. S. 693, 17 App. Div. 567, an option to enter into a contract of sale; also *Bender v. Schatzkin*, 96 N. Y. S. 203.

market value of the land over the option price,<sup>6</sup> or depending on the facts, the difference between the option price and the price at which the optionee has contracted to resell the optioned property.<sup>7</sup>

SEC. 1105. CASES INVOLVING SALE AND RETURN.—Plaintiff contracted to sell certain stock of a corporation to defendant, at its option, for a certain price, and within a certain time. Subsequently he delivered the stock to defendant, who executed a writing acknowledging the receipt of the stock and agreeing to pay therefor according to the terms of the option contract, or return the stock within a certain time. It was held that on failure to return the stock within the stipulated time, defendant became liable for the price.<sup>1</sup> Under an option to sell stock, upon election by the seller to sell and tender of the shares, the optionee becomes entitled to a transfer of the title to the stock and the optionor has a right to sue for the price.<sup>2</sup>

<sup>6</sup> *Pearson v. Horne*, 139 Ga. 453, 77 S. E. 387, where complaint for breach of option alleged damages as difference between option price and market value and was sustained as against a general demurrer.

<sup>7</sup> *Naylor v. Parker*, (Tex. Civ. App.) 139 S. W. 93; see *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413; also *Roper v. Milbourn*, 93 Neb. 809, 142 N. W. 792, Ann. Cas. 1914B, 1225.

Rule of damages when plaintiff was given an option to purchase a mine, the optionors covenanting to sink a shaft at least 100 feet and failed to do so, *Davis v. Eames*, (Cal.) 35 P. 566, citing and distinguishing *Woodworth v. McLean*, 97 Mo. 325, 11 S. W. 43.

Where a corporation sells its assets before election under option on its stock, the price for the assets is basis for damages, *Re South African etc. Co.*, 74 L. T. Rep. 796, affirmed 77 L. T. Rep. 377.

<sup>1</sup> *Stevens v. Hertzler*, 109 Ala. 423, 19 So. 838; see *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190.

As to sale or return, see Secs. 111, 828.

<sup>2</sup> *Cuthill v. Peabody*, 19 Cal. App. 304, 125 P. 926.

If the option is one to return the property if not liked by the purchaser, and the property is returned by him within the time limit, he is entitled to recover as damages the amount of the purchase price paid.<sup>3</sup>

When the optionee elects to purchase, under the option, and the optionor breaches, the damages for breach are measured by the rule applicable to agreements of sale and purchase.<sup>4</sup>

SEC. 1106. CASES INVOLVING EXPIRED OPTIONS, AND UNEXPIRED OFFERS.—Under an option for purchase of land running for “fifteen days and good thereafter until withdrawn,” the consideration for which was, in fact, an oral agreement for exchange of land, where tender of a deed in exchange was not made until after the lapse of fifteen days, and after withdrawal of the option by the optionor,<sup>1</sup> the optionee can not thereafter maintain an action for damages.<sup>2</sup>

And so, where a deposit is made by an optionee to secure performance of his offer to purchase and to be applied on the price if his offer is accepted. If the optionee withdraws his offer to purchase before acceptance by the optionor, the optionee may recover from the optionor the proceeds of a deposit check which the latter had cashed.<sup>3</sup>

<sup>3</sup> *Giles v. Bradley*, 2 John. Cas. (N. Y.) 253.

<sup>4</sup> See Sec. 1118.

<sup>1</sup> *Hay v. Mason*, 141 Cal. 722, 75 P. 300.

<sup>2</sup> See *Loeffler v. Wright*, 13 Cal. App. 224, 109 P. 269.

<sup>3</sup> *Scoy v. Winter*, (Mo. App.) 175 S. W. 132, the court holding that such deposit was without consideration, the optionor not agreeing to do anything.



And so, also, where the optionor fails to grade the optioned property as stipulated, the optionee may recover back his payment made under the contract.<sup>4</sup>

SEC. 1107. CASES INVOLVING OPTIONS TO SELL.—If the option is one to sell, as distinguished from an option to purchase, for which a deposit is made by the purchaser, the only remedy of the purchaser, when the vendor does not exercise his option to sell, is the recovery of the deposit money. Thus, when the option in a lease for which a deposit of \$50 was made by the purchaser, provides that if the vendor furnishes a good and sufficient warranty deed in 30 days, the purchaser is to pay the remaining \$350 within a certain time, but if the vendor does not furnish the deed within 30 days, the deposit shall be returned to the purchaser, the only remedy of the purchaser is to recover the deposit; he can not maintain a suit to compel the vendor to convey.<sup>1</sup>

Similar to the Barker case is a Massachusetts case where the optionor agreed to recommend to the optionee certain lands, within a fixed time, and promised that if the sale was not completed within one month, he would return the \$500 paid, the instrument reciting that it was not the intention to bind either of the parties to complete the transaction. The optionor did not complete the transaction within one month, and it was held the optionee could recover the money paid.<sup>2</sup>

<sup>4</sup> Richards v. Creighton, (Tex. Civ. App.) 157 S. W. 456.

<sup>1</sup> Barker v. Critzer, 35 Kan. 459, 11 P. 382.

<sup>2</sup> Sirk v. Ela, 163 Mass. 394, 40 N. E. 183.

**SEC. 1108. OPTION CASES INVOLVING APPLICATION OF PAYMENTS AS RENT.—**

Defendant paid plaintiff money under an agreement that on payment of a further sum, within a specified time, plaintiff would sell him a certain vessel, and that if defendant failed to exercise the option, the cash payment should be retained by plaintiff as rent for the vessel, and defendant should owe plaintiff nothing more. Defendant did not elect to buy within the time specified, and it was held plaintiff could not recover damages from defendant for his alleged breach of the contract, as the retention of the money by plaintiff relieved the defendant from any further obligation under it.<sup>1</sup>

**SEC. 1109. OPTION CASES INVOLVING TITLE.—**Where the vendor holds an option only on the land, and does not acquire title during the life of an option to purchase the land, which he had given to a third person, the vendor can not maintain an action for breach of the option contract, resulting from the refusal of the third person to comply with the option, the option giving the third person the right to decline to perform if the title is not legally sufficient, or not perfected within a reasonable time, where he renounces the option before its expiration, on the ground the title is not satisfactory.<sup>1</sup>

Where an option makes the optionee the exclusive judge of the sufficiency of the title to the property, and provides that the deposit money shall be

<sup>1</sup> Ollinger v. Bruce Dry Dock Co., 158 Ala. 173, 48 So. 482.

<sup>1</sup> Thrower v. Logan, 137 Ga. 655, 74 S. E. 253.

returned if the title is rejected, and the optionee, in good faith, rejects the title, he may maintain an action against the optionor to recover the deposit money.<sup>2</sup>

If title to the property proves imperfect, there is an implied obligation on the part of the owner to return the earnest money,<sup>3</sup> and where the title to the land is not satisfactory to the optionee, his only remedy is to recover the purchase money paid; he can not compel the optionor to clear up the title.<sup>4</sup>

And so, where plaintiff made a payment under an option on land belonging to defendant under a prior unrecorded deed, of which plaintiff had notice, and both plaintiff and defendant acted in good faith, plaintiff can recover from defendant only the amount actually paid before notice of defendant's rights.<sup>5</sup>

Where one enters upon and cultivates plantation property, with an option of buying, or paying rent, at the end of a year, and at the end of the year, voluntarily abandons the option and the property, he can not recover damages alleged to have been sustained by reason of the failure of the owner of the property to make him title.<sup>6</sup> Nor can an action for damages for breach be maintained on a written

<sup>2</sup> *Simmons v. Zimmerman*, 144 Cal. 256, 79 P. 457, 1 Ann. Cas. 850; see, also, *Delano v. Saylor*, (Ky.) 113 S. W. 888.

<sup>3</sup> *Indiana etc. Co. v. Pharr*, 82 Ark. 573, 102 S. W. 686, especially where the optionee rescinds on that ground and the optionor does not perfect the title within the stipulated time, *Burks v. Davies*, 85 Cal. 110, 24 P. 615, 20 A. S. R. 213.

<sup>4</sup> *Friendly v. Elwert*, 57 Ore. 599, 105 P. 404, 112 P. 1085, Ann. Cas. 1913A, 357; but as to encumbrances, see Secs. 910, 1006.

<sup>5</sup> *Lindley v. Blumberg*, 7 Cal. App. 140, 93 P. 894.

<sup>6</sup> *Darragh v. Vicknair*, 126 La. 171, 52 So. 264.

option, where the land is so vaguely described that the writing furnishes no key to its identification.<sup>7</sup>

SEC. 1110. OPTION CASES INVOLVING FRAUD.—Where the option was procured through fraud of the optionee, he can not maintain a suit against the optionor, for damages, for breach of contract, that is, for refusal to convey.<sup>1</sup>

That a tenant, obtaining a lease, secretly acted for another, does not prevent him from suing for breach of contract to convey, on his exercise of the option contained in the lease.<sup>2</sup>

Where an option contract falsely represented that the optionor's title to the land was good, a prospective purchaser can not recover, as damages for such representations, expenses incurred by him in examining the land prior to the time he secured the option.<sup>3</sup>

A lease of land for oil purposes contained a provision that the lessee should have the refusal, for three months, of certain other land of the lessor on terms equal to the price offered by any other person therefor. The lease was assigned. The assignee notified the lessor of his election to take a lease of the other land and the lessor notified him that \$20,000 had been offered for a lease of the property. That amount was paid and a lease taken. In fact the best *bona fide* offer that had been made was \$10,000. It was held the assignee could recover

7 Tippins v. Phillips, 123 Ga. 415, 51 S. E. 410.

1 Colbert v. Shepherd, 89 Va. 401, 16 S. E. 246.

2 Walshe v. Endom, 129 La. 148, 55 So. 744.

3 Clark v. East Lake L. Co., 158 N. C. 139, 73 S. E. 793.

\$10,000 damages without regard to the value of the other lease.<sup>4</sup>

If the optionor, by his conduct, prevents the optionee from accepting the offer, he is liable to the optionee in assumpsit.<sup>5</sup>

And so, where the optionor conveys the land to a *bona fide* purchaser, the optionee may recover the amounts paid on the contract, and also, where the payments were made by the optionee to the optionor under fraudulent representations by the latter leading the optionee to believe the instrument was an agreement to convey instead of an option.<sup>6</sup>

SEC. 1111. OPTION CASES INVOLVING “LIQUIDATED DAMAGE” CLAUSES.—If the option stipulates what the damages shall be in case of breach by the optionee, and the case is one where the damages resulting from a breach, are uncertain and do not fall within any fixed and established rule of law for measuring damages, the stipulation will be upheld and enforced.<sup>1</sup> In such

<sup>4</sup> Guffey v. Clever, 146 Pa. 548, 23 Atl. 161.

<sup>5</sup> Guilford v. Mason, 24 R. I. 386, 53 Atl. 284.

<sup>6</sup> Torrey v. McFadyen, 165 N. C. 237, 81 S. E. 296.

<sup>1</sup> Womack v. Coleman, 89 Minn. 17, 93 N. W. 663, 92 Minn. 328, 100 N. W. 9, case where option provided that first payment of \$15,000, evidenced by promissory note of optionee and one endorser, be placed in escrow to be delivered to optionor as an absolute forfeiture and indemnity in case optionee failed to pay the price on tender of marketable and sufficient title. The optionor tendered such title, thus putting optionee in default, and was held entitled to retain the \$15,000 note as liquidated damages.

The same rule was applied in *Garcin v. Pennsylvania Furnace Co.*, 186 Mass. 405, 71 N. E. 793, involving an option for the purchase of an iron manufacturing plant, the option providing for forfeiture and directing the depository to pay over the deposit money to the optionor

case, no other or greater damages can be recovered. Thus, where an option for the purchase of a mine provided for certain payments and certain work,

in case of optionee's default, the court holding the deposit was not merely to secure the optionor against loss. But it is otherwise when the optionor fails to tender his deed of conveyance within the option time, *McHenry v. Mitchell*, 219 Pa. 297, 68 Atl. 729; *Lumaghi v. Abt*, 126 Mo. App. 221, 103 S. W. 104.

- 1 Whether a stated sum is liquidated damages or a penalty, is to be determined from all the circumstances surrounding the execution of the contract and they may be shown by parol evidence without varying the contract, *Kinkaid v. Levy*, 151 Mo. App. 352, 131 S. W. 757.

In *Smith v. Newell*, 37 Fla. 147, 20 So. 249, Justice Taylor, speaking of the rules of construction and remedies, said: "If the contract provides for a definite sum as the liquidated, stated, or stipulated amount to be paid upon a breach thereof, then the amount so stipulated, liquidated, and fixed upon by the parties can be directly sued for in debt or assumpsit, and recovered, as is attempted in this case; and in such event no proof is necessary on the plaintiff's part of the sustainment of any actual loss or damage by reason of the defendant's breach, but he sues for and recovers the stipulated sum as upon a special and specific promise to pay that sum. All that is necessary to entitle the plaintiff, in such a case, to recover the stipulated sum, is to show the breach of the contract upon which the payment thereof depends. If, on the other hand, the sum mentioned in the contract to be paid upon a breach thereof is construed to be merely a penalty, and not liquidated or stipulated damages, then the plaintiff must sue for the damage actually resulting from the breach, and not for the specific sum named as the penalty, and must allege, not only the breach of the contract, but such other essential matters of fact as are necessary to show that he has sustained actual damage by reason of the breach; and he must prove the actual damage that he has sustained, and he can not, in such a case, recover any greater sum as damages than his proofs show him to have actually sustained in consequence of the breach of the contract. In such cases the plaintiff is entitled to recover all such damages as he proves himself to have actually sustained in consequence of the breach, whether they exceed the amount of the penalty mentioned in the contract or not. The amount of the penalty does not, in such cases, limit the amount of the recovery. *Noyes v. Phillips*, 60 N. Y. 408. Whether the sum mentioned in the contract is to be considered as liquidated damages, or as a penalty merely, is always a question of law for construction by the court. It is a question that has often come before the courts, both in this country and in England, and has given rise to as great a variety of judicial utterance as there are kinds of contracts among

at certain times, by the optionee, and that if he should fail to pay any of the installments of the price, or should fail to comply with any of the covenants or conditions of the option, the contract should terminate, and all installments or other sums which may have been paid by the optionee, should be forfeited and become liquidated damages, such provisions limit the damages, where the contract is forfeited by abandonment, to the work done and payments made by the optionee, and exclude recovery for the price of unperformed labor and unpaid installments.<sup>2</sup>

A provision in a contract for the sale of land that a default in the payment of an installment of the price shall abrogate it, and that the vendor may re-enter and that all improvements put on the property by the vendee and all payments on account of the price, shall be forfeited to the vendor as

men. All the courts agree that, for its solution, no fixed or general rule can be laid down for the government of all cases, but that each case must necessarily stand, for its proper construction, in large measure upon its own bottom. Some general rules have become well established, however, for the guidance of the courts in solving the question whenever presented, that will govern the construction to be placed upon all contracts whose distinguishing terms and provisions bring them within the limits of such rules. Among the general rules of construction so settled and agreed upon by the courts, there is none more firmly established than the following: 'A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty.' 1 Sedg. Dam. (8th Ed.), Sec. 411, and citations."

<sup>1</sup> In an option to purchase property valued at \$2,000,000, a stipulation for \$15,000 as liquidated damages for non-fulfillment is reasonable, *Leeman v. Edison El. Co.*, 53 N. Y. S. 302.

<sup>2</sup> *K. P. Min. Co. v. Jacobson*, 30 Utah. 115, 83 P. 728, 4 L. R. A. (N. S.) 755.

liquidated damages for use and occupation of the property, does not limit the vendor to repossessing himself of the property, but he may recover the unpaid installments.<sup>3</sup>

SEC. 1112. OPTION CASES INVOLVING FORFEITURE CLAUSES.—The optionee can not recover the consideration given for an option or deposits made thereunder, or installments paid on the price if, without fault of the optionor, he fails timely and properly to elect.<sup>1</sup> The rule respecting forfeitures sometimes applied to bilateral contracts does not apply to options. In the latter class of contracts, it is understood, in the absence of an express stipulation to the contrary, that the optionor shall retain all payments made, in the event of default by the optionee, and likewise upon rescission, unless the circumstances imply, or the agreement to rescind provides for re-payment.<sup>2</sup>

The rule grows out of the nature of the option contract. In these contracts, election, or performance constituting election by the optionee, is a condition precedent, and the optionee can not secure relief for his failure to perform such a condition, even in equity, unless it is evident the stipulation as to forfeiture is in the nature of

<sup>3</sup> *Reed v. Hickey*, 13 Cal. App. 136, 109 P. 38.

<sup>1</sup> *Torrey v. McFayden*, 165 N. C. 237, 81 S. E. 296; *Scott v. Merrill's Estate*, (Ore.) 146 P. 99.

<sup>2</sup> *Clark v. American Dev. & M. Co.*, 28 Mont. 468, 72 P. 978, this was an option on mining property and it would seem the rule is, so to speak, more strictly applied to such options; also *Williams v. Brooks*, 11 Idaho 539, 83 P. 610.



security, that is to say, one of strict penalty or forfeiture. The rule might be applicable where a very large sum was paid for the option privilege, or on account of the price, but only on the theory that thereby some estate or interest in the property had passed to the optionee,<sup>3</sup> but in the ordinary case of a nominal or small payment, the option right and the moneys paid thereunder, are absolutely lost by the default of the optionee, the optionor not being in default.<sup>4</sup>

A forfeiture clause, however, does not entitle the optionor to retain the money paid by the optionee thereon, where the optionor is not the owner of the whole title he contracts to convey, and the optionee learning of this defect, rescinds the contract. In such case, the optionee is entitled to recover back the money paid on the contract, if the optionor fails to perfect his title within the stipulated time.<sup>5</sup>

SEC. 1113. OPTION CASES INVOLVING “NULL AND VOID” CLAUSES.—A contract for the sale of land on a certain day and providing “that if payment is not made on said day that this contract is to be null and void,” and the vendor released from all obligations to the vendee, is a mere option to purchase and gives neither party a claim for damages.<sup>1</sup>

<sup>3</sup> See note 4, Sec. 501.

<sup>4</sup> See *Nelson v. Stephens*, 107 Wis. 136, 82 N. W. 163.

<sup>5</sup> *Burks v. Davies*, 85 Cal. 110, 24 P. 613, 20 A. S. R. 213.

<sup>1</sup> *Huggins v. Safford*, 67 Mo. App. 469.

SEC. 1114. OPTION CASES INVOLVING LIABILITY OF TELEGRAPH COMPANY FOR NEGLIGENT TRANSMISSION OF TELEGRAMS.—The appellees delivered a telegram to appellant for transmission, reading “Can get option for one twenty-five per acre for forty days putting up five hundred dollars” which was negligently made to read “seventy-five” instead of “one twenty-five.” It was shown that had the telegram been correctly transmitted, the option would not have been accepted, and it was held that the \$500 option which was put up and lost through the mistake, was damages reasonably in contemplation of the parties and for which the appellant, telegraph company, was liable.<sup>1</sup>

Plaintiff when he delivered a telegram to the agent of the defendant company, stating, in answer to a telegraphic inquiry, that he would sell 500 head of cows at a certain price, the trade to be closed the next day, informed the agent that he had an option on that number of cows, and, if the telegram was not delivered at once, he would lose the profit on the sale. In a suit against the company for damages for failure to deliver the telegram, it was held the damages resulting to plaintiff measured by the difference between the price at which the cattle would have been delivered to plaintiff, and the price at which he could have sold them to the vendee, had the telegram been delivered, were not too speculative to be recoverable.<sup>2</sup>

<sup>1</sup> *Western Union T. Co. v. Robertson*, (Tex. Civ. App.) 126 S. W. 629.

<sup>2</sup> *Western Union T. Co. v. Williams*, 57 Tex. Civ. App. 267, 137 S. W. 148.

**SEC. 1115. MISCELLANEOUS CASES INVOLVING ACTIONS UNDER OPTIONS.—**

Defendant company gave an exclusive option to buy or sell land belonging to it at a certain price, by a date named, and the optionee gave plaintiff the exclusive option to buy the land by that date, and agreed to pay him \$1000 if he did so, and it was held plaintiff had no right of action against the company for what he paid for the option, nor for the \$1000, though, in fact, he procured purchasers for the land, it not appearing the company employed him, or agreed to pay for his services.<sup>1</sup>

Plaintiff conceived a scheme for combining the lead interests of the county, and in connection therewith, secured options for the purchase of plants. He presented the scheme to defendant, who formed a corporation as planned, but excluded plaintiff, and it was held that plaintiff, if he transferred the option to defendant, could, in the absence of special agreements, recover only the damages for their wrongful conversion.<sup>2</sup>

The owner of an option on coal land agreed to grant and sell all the optioned coal land, the purchaser paying \$1 for the option on the seller's option, and on election and notice, agreed to pay the original optionors the several sundry sums stipulated in their option, and the further sum of \$40 per acre to the seller of the option, for every acre which the purchaser elected to purchase, and

<sup>1</sup> *Cummings v. Town of Lake R. Co.*, 86 Wis. 382, 57 N. W. 43.

<sup>2</sup> *Haskins v. Ryan*, 75 N. J. Eq. 330, 78 Atl. 566.

See *Twin City Power Co. v. Barrett*, 126 Fed. 302, 61 C. C. A. 288, where plaintiff, as assignor of option, recovered price from assignee upon default of latter to turn over bonds of corporation to be formed.

should "take up." The second party thereafter elected and gave notice to the seller of the option, but failed to exercise his right to purchase from the original optionor after he became its owner, and it was held the owner of the original option was entitled to recover from the purchaser the difference between the option price and \$40 per acre.<sup>3</sup>

Plaintiff and defendants entered into an agreement providing that if plaintiff would deliver an option on certain land and perform certain services, defendants would take a lease on the property, erect a theatre thereon, and, after their advances had been deducted, would make him a full partner with them in the concern, and plaintiff delivered the option to defendants and performed all the services possible on his part, but not in full, owing to the fact that defendants refused to go forward with the performance of the agreement. It was held plaintiff was entitled to recover both the value of his option surrendered, and the value of his services rendered.<sup>4</sup>

**SEC. 1116. ACTION BY VENDOR FOR PRICE UNDER BILATERAL CONTRACT. REAL PROPERTY.**—The decisions of the courts on the subject matter of this section are at variance. Some hold the only remedy of the vendor for a default of the purchaser in payment of the price, under an executory contract for purchase of land, is an action for damages. Others hold the vendor has, also, an action at law, or a suit in the nature of specific performance, to recover the price.

<sup>3</sup> *Strasser v. Steck*, 216 Pa. 577, 66 Atl. 87.

<sup>4</sup> *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057.

The decisions all agree the vendor, in the case stated, has an action at law to recover damages for the breach, and, in many jurisdictions, it is held that, in a proper case, the vendor has a suit in equity for specific performance of the contract which has for its object the recovery of the price upon transfer of the title to the property. There is disagreement, however, whether the vendor has an *action at law* to recover the price.<sup>1</sup>

<sup>1</sup> Holding the vendor may recover the price, see *Anderson v. Wallace L. Co.*, 30 Wash. 147, 70 P. 247; *Goodpaster v. Porter*, 11 Iowa 161, option; *Oatman v. Walker*, 33 Me. 67, price and interest, deed tendered; *Garrard v. Dollar*, 49 N. C. 175, 67 Am. Dec. 271, full performance by vendor; *Curran v. Rogers*, 35 Mich. 221, deed tendered and possession taken; *Gray v. Meek*, 199 Ill. 136, 64 N. E. 1020, to recover installments, no deed tendered; *North Stockton etc. Co. v. Fischer*, 138 Cal. 100, 70 P. 1082, 71 P. 438, balance of price recovered, deed having been tendered.

*Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87, holding action at law for damages for excess of price over market value under the circumstances was not adequate and specific performance was appropriate remedy to recover price.

*Prichard v. Mulhall*, 127 Iowa 545, 103 N. W. 774, 4 Ann. Cas. 789, holding that an action at law to recover the contract price will not lie, the court saying "the decided weight of authority is to the effect that, upon breach by the vendee of an executory contract for the sale of land, the vendor's remedy is in equity for specific performance, or at law for damages and that an ordinary action for the recovery of the contract price will not lie."

*Reed v. Dougherty*, 94 Ga. 661, 20 S. E. 965, holding where no conveyance of title and possession not taken, vendor has only two remedies, specific performance or action at law for damages, but so long as title remains in vendor he can not maintain an action for the purchase money, or for balance of the same.

*Goodwine v. Kelley*, 33 Ind. App. 57, 70 N. E. 832, holding purchase price not recoverable in action at law, as measure of damages is the excess of the price over the fair or cash market value of land at the time of breach; also *Carter v. Reaume*, 159 Mich. 160, 123 N. W. 539; also, *Hogan v. Kyle*, 7 Wash. 595, 35 P. 399, 38 A. S. R. 910; *Davis v. Watson*, 89 Mo. App. 15; *Glock v. Howard & W. Colony Co.*, 123 Cal. 1, 10, 55 P. 713, 43 L. R. A. 199, 69 A. S. R. 17; *Bessinger v. Erhardt*, 77 N. Y. S. 577, 34 App. Div. 169; *Congregation v. Church*,

May a vendor retain the title and ownership of the land and recover the price? May he recover the price if he tenders a deed of conveyance?

Clearly, in the case stated, he may not recover the price, either at law or by means of specific performance, without tendering his deed, and, on principle, he may not recover the price, as such, upon tendering his deed except by suit in equity or in an action at law which has for its object the specific enforcement of the contract in accordance with equitable principles,<sup>2</sup> for it is in such a proceeding only that transfer of the title can be had and it is only when the title has been transferred, or a deed tendered, and the tender kept good,<sup>3</sup> that the vendor

10 Abb. Pr. (N. S.) 484, and, *contra*, Richards v. Edick, 17 Barb. (N. Y.) 260, holding price may be recovered in an action at law; Dopp v. Richards, 43 Utah 332, 135 P. 98, where vendor re-entered.

<sup>2</sup> In some jurisdictions recovery of the price is allowed in an action at law, the form of the action being disregarded, the facts being sufficient under code practice to grant equitable relief, Gilpin Co. Mine Co. v. Drake, 8 Colo. 586, 9 P. 787.

Also, in accordance with equitable principles, see Rindge v. Baker, 57 N. Y. 209, 15 Am. Rep. 475; Murray v. Ellis, 112 Pa. 485, 3 Atl. 845; Von Roeder v. Robson, 20 Tex. 754; O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112, 1114.

<sup>3</sup> Dunn v. Mills, 70 Kan. 656, 79 P. 146, 3 Ann. Cas. 363, the vendee was in possession and refused to give it up. The vendor's deed was required to be placed with the clerk of the court; see Carter v. Reaume, 159 Mich. 160, 123 N. W. 539; Johnston v. Wadsworth, 24 Ore. 494, 34 P. 13; King v. Smith, 33 Vt. 22.

Tender of deed for land must be kept good, probably placed in custody of court for delivery. The rule applicable to sale of personal property, that tender of the specific articles at the proper time and place operates to pass title, has no application, see Prichard v. Mulhall, 127 Iowa 545, 103 N. W. 774, 4 Ann. Cas. 789.

An exception is made in some cases where notes are given for the purchase money and the suit is on the note, see Snyder v. Murdock, 51 Mo. 175; Leopold v. Furber, 84 Ky. 214, 1 S. W. 404, 8 Ky. L. Rep. 198, installment notes; Brame v. Swain, 111 N. C. 540, 15 S. E.

is entitled to recover the price, as such, in lieu of damages. Otherwise, the vendor would have both the property and the price, a result not in harmony with equitable principle and certainly not in keeping with the theory of damages for breach of contract.<sup>4</sup>

**SEC. 1117. ACTION BY VENDOR FOR DAMAGES UNDER BILATERAL CONTRACT. RULE OF DAMAGES.**—The general rule, where no part of the price has been paid, is that the vendor, on breach of the contract on the part of the purchaser, in payment of the price, is entitled, as damages, to the excess of the contract price with interest added, over the market value of the land at the time of the breach.<sup>1</sup>

938, installment notes; *First Nat'l Bank v. Agnew*, 45 Wis. 131, installment notes.

<sup>3</sup> In others, however, it is held the fact that a promissory note is given for an installment, or for the full price, is immaterial, as between the parties, as the same rule obtains whether the promise to pay is contained in a note or in the executory agreement, a previous tender of a deed by the vendor being necessary, *Ewing v. Wightman*, 167 N. Y. 107, 60 N. E. 322; see *Northwestern National Bank v. Ramsey*, 96 Wis. 544, 71 N. W. 939; *Underwood v. Tew*, 7 Wash. 297, 34 P. 1100, waiver by not timely suing; also *Lumaghi v. Abt*, 126 Mo. App. 221, 103 S. W. 104, note given for option; *Pursley v. Good*, 94 Mo. App. 382, 68 S. W. 218, option.

<sup>4</sup> *Prichard v. Mulhall*, 127 Iowa 545, 103 N. W. 774, 4 Ann. Cas. 789.

<sup>1</sup> *Old Colony R. Corp. v. Evans*, 72 Mass. (6 Gray) 25, 66 Am. Dec. 394; *Hogan v. Kyle*, 7 Wash. 595, 35 P. 399, 38 A. S. R. 910; *Smith v. Newell*, 37 Fla. 147, 20 So. 249; *Porter v. Travis*, 40 Ind. 556, when deed should have been delivered if at that time there was any decrease in value; *Allen v. Mohn*, 86 Mich. 328, 49 N. W. 52, 24 A. S. R. 126, at time of abandonment; *Grizwold v. Sabin*, 51 N. H. 167, 12 Am. Rep. 76; *Harmon v. Thompson*, 119 Ky. 528, 84 S. W. 569, 27 Ky. L. Rep. 181, interest; *Carter v. Reaume*, 159 Mich. 160, 123 N. W. 539, where assignee of vendor sues; *Wilson v. Hoy*, 120 Minn. 451, 139 N. W. 817, not difference between price and cost of property to

Where payments have been made on account of the price, in determining the damages, the payments must be deducted from the price, and it is the excess, if any, of the balance of the unpaid price and interest, over the value of the land, that is recoverable as damages.<sup>2</sup>

It will be seen, therefore, that in those jurisdictions where the above rule is exclusive, there may not be an action at law to recover the price, as such, and that, consequently, the sole remedy of the vendor for breach by the vendee, is a suit at law to recover damages in accordance with the rule above stated, and further, that if the vendor desires to recover the price he must resort to a suit in the nature of one for specific performance.

vendor; *Baerenklau v. Peerless Realty Co.*, 80 N. J. Eq. 26, 83 Atl. 375, no damages if land has increased in value; *Burnham v. Roberts*, 70 Ill. 19.

<sup>1</sup> Of course the vendor may also sue and recover for breach of the various stipulations of the contract, such as one providing for payment of the taxes by the vendee, *Preble v. Baldwin*, 60 Mass. (6 Cush.) 549; *Prichard v. Mulhall*, 127 Iowa 545, 103 N. W. 774, 4 Ann. Cas. 789.

<sup>2</sup> Less payments made, *Ellet v. Paxson*, 2 Watts & S. (Pa.) 418.

Where value exceeds price, only nominal damages, *Evril v. Bancroft*, 22 Ohio St. 172; *Hurd v. Dunsmore*, 63 N. H. 171; *Brooks v. Miller*, 103 Ga. 712, 30 S. E. 630.

Rule as to damages where the optionor having only an option, sells the optioned land to a third party having notice of the terms of his option and who defaults, *Roper v. Milbourn*, 93 Neb. 809, 142 N. W. 792, Ann. Cas. 1914B, 1225. In this action the complaint alleged as damages the excess in price on 1000 acres (of the 1600 acres under plaintiff's option from the owner) sold to defendant, over the price under plaintiff's option from the owner, and also the loss resulting to plaintiff from his inability to carry out his option from the owner and purchase the remaining 600 acres, and certain other special damages. The court held such damages, under the circumstances, within the contemplation of the parties. See *Naylor v. Parker*, (Tex. Civ. App.) 139 S. W. 93; *Arentsen v. Moreland*, 122 Wis. 167, 99 N. W. 790, 106 A. S. R. 961, 65 L. R. A. 973, 2 Ann. Cas. 628; *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413.



**SEC. 1118. ACTION BY PURCHASER FOR DAMAGES UNDER BILATERAL CONTRACT. RULE OF DAMAGES.**—As noted in a former section, upon breach of the contract to convey by the vendor, the purchaser has the following remedies, namely: (a) An action for damages for the breach; (b) an action to recover back the purchase money paid, or, (c) a suit for specific enforcement of the contract.

The next chapter is devoted to the presentation of the subject of specific performance. As to the other remedies, it should be observed the purchaser, as well as the vendor, is put to his election. An action at law for damages and also a suit for specific performance of the contract, are based upon the contract, while a suit to recover the purchase money paid, is in disaffirmance, or rescission, of the contract.

Upon breach by the vendor, the purchaser is entitled to nominal damages, in any event, and, in certain jurisdictions, to compensatory damages for loss, or injury, sustained by him as the result of the breach, but not, of course, to speculative or remote damages.<sup>1</sup>

<sup>1</sup> Location of manufacturing plant in town in which lots sold were situated, *Ansley v. Bank of Piedmont*, 113 Ala. 467, 21 So. 59, 59 A. S. R. 122; land subdivision, *Dady v. Condit*, 209 Ill. 488, 70 N. E. 1088; loss from re-sale, *Lynch v. Wright*, 94 Fed. 703; *Naylor v. Parker*, (Tex. Civ. App.) 139 S. W. 93, under option; boom prices, *Carbondale Inv. Co. v. Burdick*, 58 Kan. 517, 50 P. 442; *Houston etc. R. Co. v. Wright*, 15 Tex. Civ. App. 151, 38 S. W. 836, loss of payments; *Sixta v. Land Co.*, 157 Wis. 293, 147 N. W. 1042, profits from sales.

Purchaser can not recover for loss of profits on re-sale where he told vendor, on election to purchase, he had sold the property without profit, *Smith v. Cauthen*, 98 Miss. 746, 54 So. 844.

Profits from hotel business, option to renew lease, *Neal v. Jefferson*, 212 Mass. 517, 99 N. E. 334, Ann. Cas. 1913D, 205.

The English rule is that the purchaser, upon breach by the vendor, is entitled to a return of the purchase money paid with interest and expenses incurred in investigating the title, but nothing for loss of his bargain, unless there is bad faith on the part of the vendor in refusing to convey.<sup>2</sup> This rule is followed in several states.<sup>3</sup> In other states, the vendee is entitled to recover for loss of his bargain and other special damages irrespective of the good or bad faith of the vendor.<sup>4</sup>

<sup>2</sup> *Engell v. Fitch*, L. R. 4 Q. B. 659, 38 L. J. Q. B. 304, 17 Wkly. Rep. 894; *Jones v. Gardiner*, 1 Ch. 191, 71 L. J. Ch. 93, 86 L. T. Rep. (N. S.) 74, 50 Wkly. Rep. 265.

Bad faith exists where the vendor's breach of contract "results, not from his misfortune in proving to be not entitled to the land of which he believed himself to be the owner, but from his misconduct, or from his undue precipitancy, as, for example, when he had subsequently conveyed to another person or where he had entered into another contract to sell before he had himself acquired title to the land," *Stuart v. Pennis*, 100 Va. 612, 42 S. E. 667.

<sup>3</sup> See *Smith v. Bangham*, 156 Cal. 359, 104 P. 698, 28 L. R. A. (N. S.) 522; *Smith v. Newell*, 37 Fla. 147, 20 So. 249; *Dal. v. Fischer*, 20 S. D. 426, 107 N. W. 534; *Stuart v. Pennis*, 100 Va. 613, 42 S. E. 667; *Marsh v. Cavanaugh*, 15 Wash. 282, 46 P. 239, money paid with interest; *Eggert v. Pratt*, 126 Iowa 727, 102 N. W. 786; *Tracy v. Gunn*, 29 Kan. 508; *Horner v. Beasley*, 105 Md. 193, 65 Atl. 820, money paid with interest; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Welch v. Lawson*, 32 Miss. 170, 66 Am. Dec. 606; *Scherek v. Moyse*, 94 Miss. 259, 48 So. 513; *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463; *Margraf v. Muir*, 57 N. Y. 155; *Brown v. Honiss*, 70 N. J. L. 260, 58 Atl. 86, s. c. 74 N. J. L. 501, 68 Atl. 150, option in lease, refusal; *Thompson v. Sheplar*, 72 Pa. 160; *Gray v. Howell*, 205 Pa. 211, 54 Atl. 774; *Phillips v. Herndon*, 78 Tex. 378, 14 S. W. 857, 22 A. S. R. 59; *Mullen v. Cook*, 69 W. Va. 456, 71 S. E. 566; *Ross v. Saylor*, 39 Mont. 559, 104 P. 864; *Young's Ex'r v. Singleton*, 29 Ky. 316; *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Mobley v. Lott*, 127 Ga. 572, 56 S. E. 637.

<sup>4</sup> *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677; *Roche v. Smith*, 176 Mass. 595, 58 N. E. 152, 51 L. R. A. 510; *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413, option; *Atwood v. Walker*, 179 Mass. 514, 61 N. E. 58, following New York rule because contract made in New York; *Vallentyne v. Land Co.*, 95 Minn. 195, 103 N. W. 1028, 5 Ann. Cas.

Damages for loss of the bargain are the same under this rule as under the English rule where there has been bad faith on the part of the vendor, and includes the excess, if any, of the market value of the land, at the time of breach of the contract, over the price agreed to be paid,<sup>5</sup> with interest<sup>6</sup> if the vendor retains possession,<sup>7</sup> together with expenses of investigating title and preparing to enter upon the land. Where payments have been made on the price, and the vendor refuses to convey, the damages are sometimes stated to be the value of the land agreed to be conveyed at the time of breach, less the unpaid purchase price.<sup>8</sup>

212; *Scheerschmidt v. Smith*, 74 Minn. 224, 77 N. W. 34; *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014, covenant of warranty; *Beetem v. Follmer*, 87 Neb. 514, 127 N. W. 858; *Walshe v. Endom*, 129 La. 148, 55 So. 744, option; *Dunshee v. Geoghegan*, 7 Utah 113, 25 P. 731; *Arentsen v. Moreland*, 122 Wis. 167, 99 N. W. 790, 106 A. S. R. 951, 65 L. R. A. 973, 2 Ann. Cas. 628; *Brink v. Mitchell*, 135 Wis. 416, 116 N. W. 16, option, sale by optionor to third person; *Hartzell v. Crumb*, 90 Mo. 629, 3 S. W. 59.

<sup>5</sup> *Hartzell v. Crumb*, 90 Mo. 629, 3 S. W. 59; excess payment on price, *Kean v. Laudram*, 72 S. C. 556, 52 S. E. 421; liquidated damages, *Chapman v. Propp*, (Minn.) 147 N. W. 442; *Brooks v. Miller*, 103 Ga. 712, 30 S. E. 630, nominal damages only if market value not greater than contract price.

<sup>6</sup> *Smith v. Lander*, (Tex. Civ. App.) 89 S. W. 19.

In New York interest is not recoverable unless the land has an established market value, or unless the value can be ascertained by computation, the theory being that otherwise the damages are unliquidated, *Sloan v. Baird*, 162 N. Y. 327, 56 N. E. 752; *Worrall v. Munn*, 53 N. Y. 185; but not costs and attorney's fees in unsuccessfully seeking to compel specific performance, nor for rent paid after exercise of option, *Walshe v. Endom*, 129 La. 148, 55 So. 744.

<sup>7</sup> *Kicks v. State Bank*, 12 N. D. 576, 98 N. W. 408.

<sup>8</sup> *Neppach v. Oregon etc. R. Co.*, 46 Ore. 374, 80 P. 482, 7 Ann. Cas. 1035; *Mullen v. Cook*, 69 W. Va. 456, 71 S. E. 566; *Hallett v. Taylor*, 177 Mass. 6, 58 N. E. 154.

**SEC. 1119. REMEDIES FOR BREACH OF BILATERAL AGREEMENT. PERSONAL PROPERTY. RULES OF DAMAGES.**—Where the title to the goods has not passed and the buyer refuses to accept and pay, the remedy of the seller is an action for damages for non-acceptance,<sup>1</sup> or, after a resale by him, an action to recover the excess of the contract price over the price obtained on the resale.<sup>2</sup>

The damages recoverable in the former action, when the property has a market value, are generally the difference between the contract price and the market price at the time and place of delivery.<sup>3</sup>

<sup>1</sup> *Henry H. Schott Co. v. Stone, Fisher & Lane*, 35 Wash. 252, 77 P. 192; *American Cotton Co. v. Herring*, 84 Miss. 693, 37 So. 117.

<sup>2</sup> *Cuthill v. Peabody*, 19 Cal. App. 304, 125 P. 926; *Redhead Bros. v. Wyoming Cattle Inv. Co.*, 126 Iowa 410, 102 N. W. 144; *Gehl v. Milwaukee Produce Co.*, 116 Wis. 263, 93 N. W. 26; *Daniels v. Morris*, 65 Ore. 289, 132 P. 958; *Dudley A. Tyng & Co. v. Woodward*, 121 Md. 422, 88 Atl. 243; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190.

As to notice of intention to re-sell, see *Van Brocklen v. Smeallie*, 140 N. Y. 70, 75, 35 N. E. 415; *Rea v. Holland*, 48 Mich. 218, 12 N. W. 167; *American Hide & L. Co. v. Chalkley & Co.*, 101 Va. 458, 44 S. E. 705; *Pratt v. S. Freman & Sons Mfg. Co.*, 115 Wis. 648, 92 N. W. 368.

<sup>3</sup> *Nelson v. Hirschberg*, 70 Ark. 39, 66 S. W. 347; *Scribner v. Schenkel*, 128 Cal. 250, 60 P. 860; *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140; *Bell v. Hatfield*, 121 Ky. 560, 89 S. W. 544, 72 L. R. A. (N. S.) 529; *Peters v. Cooper*, 95 Mich. 191, 54 N. W. 694; *Art-Aseptible Furniture Co. v. Shannon*, 159 Iowa 225, 140 N. W. 358; *F. W. Stock & Sons v. Snell*, 213 Mass. 449, 100 N. E. 830.

When the goods are worth more than the purchase price the seller is entitled to nominal damages only, *McCrea v. Ford*, 24 Colo. App. 506, 135 P. 465.

When no market value, or goods are to be manufactured, *Baessetti v. Shenango Furnace Co.*, 122 Minn. 335, 142 N. W. 322; *George J. Cook Co. v. Hell*, 175 Ill. App. 532; *Thomas Gordon Malting Co. v. Bartels Brewing Co.*, 206 N. Y. 528, 100 N. E. 461; *Smoothing Iron Heating Co. v. Blakely*, 94 S. C. 224, 77 S. E. 945, storage, insur-

Where the title to the goods has passed to the buyer and he neglects or refuses to pay for them according to the terms of the contract, the seller may sue for and recover the price of the goods.<sup>4</sup> Otherwise, as a general rule, he may recover damages only.<sup>5</sup>

ance, and loss of profits; *Bond v. Bourke*, 54 Colo. 51, 129 P. 223, 43 L. R. A. (N. S.) 97.

<sup>4</sup> *Olcese v. Mobile Fruit Co.*, 211 Ill. 539, 71 N. E. 1084; *American Hide & L. Co. v. Chalkley & Co.*, 101 Va. 458, 44 S. E. 705; *Hamilton v. Finnegan*, 117 Iowa 623, 91 N. W. 1039; *Obery v. Lander*, 179 Mass. 125, 60 N. E. 378.

<sup>5</sup> *John Deere Plow Co. v. Gorman*, 9 Kan. App. 675, 59 P. 177; *McCormick H. Mach. Co. v. Balfany*, 78 Minn. 370, 81 N. W. 10, 79 A. S. R. 393; *Greenleaf v. Hamilton*, 94 Me. 118, 46 Atl. 798; *Cuthill v. Peabody*, 19 Cal. App. 304, 125 P. 926; *Hamilton v. Finnegan*, 117 Iowa 623, 91 N. W. 1039.

Where the price is payable at a fixed date, irrespective of the date of delivery, an action will lie to recover the price, though the property in the goods has not passed, *Sherman Nursery Co. v. Aughenbaugh*, 93 Mass. 201, 100 N. W. 1101.

*Shearer v. Jewett*, 31 Mass. 232, case where buyer had option to pay for grain in kind or in money and sold all the grain. Held liable for the price of all the grain furnished.

The decisions exhibit the same conflict here as with reference to the recovery of the price for land. For instance, the seller may store and retain the goods for the buyer's benefit and recover the contract price, *Habeler v. Rogers*, 131 Fed. 43, 65 C. C. A. 281. So where he fully performs, *Shippo v. Atkinson*, 8 Ind. App. 505, 36 N. E. 375; *Obery v. Lander*, 179 Mass. 125, 60 N. E. 378; *American Cotton Co. v. Herring*, 84 Miss. 693, 37 So. 117; *Henry H. Schott Co. v. Stone, Fisher & Lane*, 35 Wash. 252, 77 P. 192, rule applied to stock of goods and lease of store.

On the other hand, it is held there must be such a delivery as will pass the title and vest the ownership of the goods, *Thomas D. Murphy Co. v. Exchange Nat. Bank*, 76 Neb. 573, 107 N. W. 845; *Shippo v. Atkinson*, *supra*.

Where delivery is tendered and refused, the only remedy is for damages, *Greenleaf v. Gallagher*, 93 Me. 549, 45 Atl. 829, 74 A. S. R. 371.

Where title is reserved and seller takes possession and sues to recover balance of installments, *Edward Thompson Co. v. Murphine*, 79 Wash. 672, 140 P. 1073.

34—Option Contracts.

If the seller neglects, or refuses to deliver the goods to the buyer, the buyer may sue for and recover damages for non-delivery.<sup>6</sup>

In such cases the damages recoverable are the loss directly and naturally resulting from the breach, and where there is a market price for the goods, the amount recoverable, as damages, is the difference between the contract price and the market value of the goods at the time and place of delivery.<sup>7</sup>

When the breach consists in preventing performance of the contract, without fault of the other party, who is willing to perform, the prospective damages which the latter can recover consists of (a) what he has already expended towards performance, and (b) the profits which he would have

<sup>5</sup> Option to return stock under agreement of vendor to re-purchase, vendee entitled to recover price and is not limited to difference between market value and price, *Echternach v. Moncrief*, 94 Kan. 754, 147 P. 860.

*Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807, to the effect that there may be an executed contract passing title without delivery of possession, in which case a contract for goods bargained and sold is good, because the contract is completed and the seller can therefore recover the price.

<sup>6</sup> *Arnold v. Blabon*, 147 Pa. 372, 23 Atl. 575; *Ellis v. Miller*, 164 N. Y. 434, 58 N. E. 516.

Rule where stock is held by broker subject to option and broker sells stock on declining market, *Wiggin v. Federal Stock & Grain Co.*, 77 Conn. 507, 59 Atl. 607.

<sup>7</sup> *Reeves & Co. v. Cress*, 80 Minn. 466, 83 N. W. 443; *Coxe v. Anoka W. E. L. & P. Co.*, 87 Minn. 56, 91 N. W. 265; *Loewi v. Long*, 76 Wash. 480, 136 P. 673; *Heard & Lee v. Heard*, (Ala.) 61 So. 343; *Chandler Grain & Milling Co. v. Shea*, 213 Mass. 398, 100 N. E. 663; *Patterson v. Plummer*, 10 N. D. 95, 86 N. W. 111.

When no market price at place of delivery, *Righter v. Clark*, 78 Conn. 9, 60 Atl. 741, 112 A. S. R. 84; *Coxe v. Anoka etc. Co.*, *supra*; see, also, *Connersville W. Co. v. McFarlan C. Co.*, 166 Ind. 123, 76 N. E. 294, and *Righter v. Clark*, *supra*.

realized by performance.<sup>8</sup> But profits can not always be recovered; they may be too remote and speculative in their character, and, therefore, incapable of that clear and definite proof which the law requires. When not fully proven, or when too remote, the true measure is the loss of outlay and expense.<sup>9</sup>

SEC. 1120. PLEADING.—In an action to recover damages for a landlord's failure to perform an agreement to lease, plaintiff is bound to allege an election and notice.<sup>1</sup>

Under an option by which the defendant agreed to purchase plaintiff's share in certain mining claims bought by him, at the actual amount of cash expended therefor, in a suit by plaintiff against defendant to recover damages, it is necessary to allege in the complaint, not only plaintiff's election under the option, but also a tender of performance by plaintiff, the covenants being mutual and dependent, and, in such case, the rule is that neither party can sue at law for breach until he has put the other party in default by tendering performance, and an offer to perform made in the pleadings, or at the trial, is not sufficient.<sup>2</sup>

<sup>8</sup> *Schlieder v. Dielman*, 44 La. Ann. 462, 10 So. 934.

<sup>9</sup> *Schlieder v. Dielman*, *supra*, citing and quoting from *United States v. Behan*, 110 U. S. 338, 28 L. Ed. 168, 4 S. Ct. 81.

<sup>1</sup> *Loeffler v. Wright*, 13 Cal. App. 224, 109 P. 269; see *Harle v. Haggin*, 116 N. Y. S. 51, 131 App. Div. 742.

It is not necessary to allege that the contract is supported by a consideration in those jurisdictions where the written contract imports a consideration, *Cuthill v. Peabody*, 19 Cal. App. 304, 125 P. 926.

<sup>2</sup> *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53.

But it is not necessary to allege a tender when the defendant has placed himself in a position where it can readily be seen that he can not comply with the contract, or where he absolutely repudiates it by denying its existence. Therefore, a complaint for breach of contract to sell under an option agreement, alleging the option, plaintiff's timely election to purchase the land, and its value, and defendant's refusal to comply with the option, and the sale by him of the land, before the expiration of the time limit, is sufficient without alleging what plaintiff did in the way of tender.<sup>3</sup> But, to excuse tender, the refusal must be absolute and final.<sup>4</sup>

The general rule that an allegation of tender is necessary applies to an option giving the purchaser the privilege of returning the shares of stock in a corporation, within the time and upon the condition fixed by the option. In such case, there is no obligation on the part of the seller to re-purchase the shares until the purchaser exercises his right to return and tenders back the shares, and demands repayment.<sup>5</sup>

SEC. 1121. PRACTICE.—An action by an assignor to recover the consideration paid for an option is not affected by the Statute of Frauds, the contract being executed and the consideration alone remaining unpaid.<sup>1</sup>

<sup>3</sup> *Palmer v. Clark*, 52 Wash. 345, 100 P. 749.

<sup>4</sup> *Beiseker v. Amberson*, 17 N. D. 215, 116 N. W. 94.

<sup>5</sup> *Bovee v. Boyle*, 25 Colo. App. 165, 136 P. 467; see *Pursley v. Good*, 94 Mo. App. 382, 68 S. W. 218, tender of deed under option to repurchase.

<sup>1</sup> *Landon v. Morehead*, 34 Okl. 701, 126 P. 1027.



When the option was intended for a third party and so recites, the optionee may sue and recover in his own name for the benefit of the third party the same damages as the third party would have recovered.<sup>2</sup>

An escrow holder of stock may interplead the optionor and optionee if they make conflicting claims.<sup>3</sup>

Where plaintiff sued to recover for breach of a contract to sell real estate to him, on which he had paid \$20 of the purchase price, and defendant alleged the agreement was merely an option, plaintiff is not entitled to recover the \$20 on defendant's theory of the contract, since he must recover on his own theory, or not at all.<sup>4</sup>

A complaint to recover payments made on a land option, in form for money had and received, can not be so treated when plaintiff's reply alleges that the option had not "ceased and determined."<sup>5</sup>

SEC. 1122. EVIDENCE.—Evidence as to value of the optioned property and its increase in value during the ten years preceding the trial, and the reasons for such increase, is admissible; evidence as to what plaintiff might have obtained from other parties for the option is immaterial; where

<sup>2</sup> *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413.

<sup>3</sup> *Walker v. Bamberger*, 17 Utah 239, 54 P. 108.

Bill by optionee to discover who purchaser is under option permitting optionee to purchase on as favorable terms as offered by any other person, *Taylor & McCoy Coal & Coke Co. v. Hartman*, 222 Pa. 172, 70 Atl. 1001.

<sup>4</sup> *Catterline v. Bush*, 39 Ore. 496, 65 P. 1064.

<sup>5</sup> *Quigley v. King*, 182 Mo. App. 196, 168 S. W. 285.

defendants had obtained a lease under the option, the figure at which defendants held the lease is admissible to prove the value of the option; evidence as to whether plaintiff paid anything for the option is immaterial; also whether the owner of the land had previously given an option for its purchase for a less amount; also as to the reason why the owner extended the option for one year; and also of statements by plaintiff to the owner when he obtained an extension of the option from the owner.<sup>1</sup> It is not proper to allow a real estate expert to testify whether he had ever known of an option being sold for a considerable sum, such testimony being immaterial and tending to open up collateral issues.<sup>2</sup>

Where the purchaser refuses to accept the property and it is resold, after notice to him, for the highest price reasonably obtainable, the price on resale is *prima facie* evidence of its market value.<sup>3</sup>

Plaintiff's right to recover back money paid on a land option, or damages based on the increased value of the land, is conditioned on his alleging and proving readiness and willingness to perform and refusal of the defendant to make a deed.<sup>4</sup>

Under an option to purchase land at a price to be agreed on, the price at which the land had been bought at a sale on execution against the owner is

<sup>1</sup> *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057.

<sup>2</sup> *Eastman v. Dunn*, *supra*.

<sup>3</sup> *First M. E. Church v. North*, 92 Kan. 381, 140 P. 888.

<sup>4</sup> *Quigley v. King*, 182 Mo. App. 196, 168 S. W. 285.

not a fair criterion of the price at which the optionee should purchase from the owner at such sale.<sup>5</sup>

SEC. 1123. EJECTMENT.—Where the optionee is given possession and defaults, the optionor has his remedy in ejectment to dispossess the optionee.<sup>1</sup> With reference to an option contained in leases, the lessee (optionee), not being in default under the lease, is entitled to possession during the leasehold term by virtue of that instrument and may not, therefore, be dispossessed though in default under the terms of the option contract,<sup>2</sup> the two contracts ordinarily being separate and distinct.<sup>3</sup> On the other hand, if the lessee defaults in his lease, he is not entitled to remain in possession as against the lessor by virtue of his option to purchase,<sup>4</sup> unless the option contract gives him possession,<sup>5</sup> or unless, acting under the option as distinguished from the lease, there have arisen grounds for invoking the rule of estoppel against the optionor.<sup>6</sup> It would

<sup>5</sup> *Manning v. Ayers*, 77 Fed. 690, 23 C. C. A. 405; evidence held to sustain findings revoking option, *Hay v. Mason*, 141 Cal. 722, 75 P. 300.

Evidence not sufficient to sustain finding there was no surrender of option, *K. P. Min. Co. v. Jacobson*, 30 Utah 115, 83 P. 728, 4 L. R. A. (N. S.) 755.

Further as to evidence, see Sec. 1253.

<sup>1</sup> See *Conway v. Hart*, 129 Cal. 480, 62 P. 44.

<sup>2</sup> *Brown v. Larry*, 153 Ala. 452, 44 So. 841.

<sup>3</sup> *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972; see *Brown v. Larry*, 153 Ala. 452, 44 So. 841.

<sup>4</sup> See *King v. Maxey*, (Tex. Civ. App.) 28 S. W. 401; *Clifford v. Gressinger*, 96 Ga. 789, 22 S. E. 399.

<sup>5</sup> Sec. 513.

<sup>6</sup> *Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255, improvements.

seem, however, that if the optionee had duly elected to purchase, before the ejectment suit was filed, he will have a complete defense, in those jurisdictions where a defendant may set up an equitable title as a defense.<sup>7</sup>

An optionee may not maintain ejectment against the grantee of the option during the running of the option and before election, as no title or interest in the property passes to the optionee.<sup>8</sup>

SEC. 1124. SUIT TO QUIET TITLE (REMOVE CLOUD).—After the revocation of the option, or after the expiration of the time limit, without performance, or an offer to perform by the optionee, the option is a cloud on the title and its cancellation will be decreed.<sup>1</sup> In the case just cited,

<sup>7</sup> *Parker v. Gortatowsky*, 127 Ga. 560, 56 S. E. 846; *DeRutte v. Muldrow*, 16 Cal. 505, purchaser with notice; *Bogle v. Jarvis*, 58 Kan. 76, 48 P. 558.

<sup>8</sup> *Young v. Latham*, 132 Ala. 341, 31 So. 448.

Not necessary for owner to tender deed where optionee breaches; demand for possession not necessary under circumstances; question whether plaintiff could have conveyed good title immaterial, *Bruschi v. Mining Co.*, 147 Cal. 120, 81 P. 404; *Champion Gold M. Co. v. Champion Mines*, 164 Cal. 205, 128 P. 315, optionee in possession.

In Vermont right of optionee to purchase under option, can not be litigated in proceedings in nature of ejectment by landlord, *Mack v. Dailey*, 67 Vt. 90, 30 Atl. 686.

Plaintiff must rely upon the strength of his own title and not upon the weakness of that shown by defendant, *Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255.

Refusal of injunction to restrain landlord from proceeding with warrant for ejectment of tenant, proper on facts, *Clifford v. Gressinger*, *supra*.

<sup>1</sup> *Borst v. Simpson*, 90 Ala. 373, 7 So. 814; *Larmon v. Jordan*, 56 Ill. 204, though not recorded or accepted in time; *Levy v. Lyon*, 153 Cal. 213, 94 P. 881, quiet title; *Davis v. Riddle*, 25 Colo. App. 162, 136 P. 551, oil option; see *Hull v. Angus*, 60 Ore. 95, 118 P. 284.

the court said that while a court of equity will not intervene to remove, as a cloud on the title, a deed void on its face, or when there is a mere apprehension of suit, or the mere assertion of a hostile title, it will intervene where the inherent defect can be made apparent by extrinsic evidence only.

A mortgage executed by a lessee, under a lease giving him an option to buy the fee, becomes a cloud on lessor's title after the expiration of the lease, where neither lessee nor mortgagee offers to buy, and the lessor rescinds the option by conveying the fee after the expiration of the lease.<sup>2</sup>

It is not necessary, where the optionee is in default, to return the payments made for the option, nor the installments of the price paid.<sup>3</sup> But it is otherwise where the vendor is in default,<sup>4</sup> in which case he can have a decree only on condition that he restores the money paid by the defendant on the contract.

Where the option permitted the optionees to enter and take possession upon the execution of the contract, and retain possession, so long as they complied with the conditions of the option, their possession thereunder was a mere license until they performed the option contract, so that their failure to make the first payment thereunder operated as a surrender of their possession.<sup>5</sup> Repudiation of the contract by the optionee in possession and his refusal to pay the balance of the price, entitle the

<sup>2</sup> *McCauley v. Coe*, 150 Ill. 311, 37 N. E. 232.

<sup>3</sup> *Merk v. Bowery Mining Co.*, 31 Mont. 298, 78 P. 519.

<sup>4</sup> *Benson v. Shotwell*, 87 Cal. 49, 25 P. 249, title not satisfactory.

<sup>5</sup> *Kingsley v. Kressly*, 60 Ore. 167, 118 P. 678, Ann. Cas. 1913E, 746; *Cambria Iron Co. v. Leidy*, 226 Pa. 122, 75 Atl. 186.

optionor to maintain an action to recover the property in the nature of a suit to quiet title.<sup>6</sup>

The optionee who has elected and paid the price for the land, may quiet title against a purchaser with notice of his option, though the purchaser claims under a quitclaim deed from the optionor.<sup>7</sup>

SEC. 1125. DETAINER.—Forcible detainer does not lie against a person who has entered into possession of the premises under a lease containing an option to purchase, where he has exercised his option to purchase, and has complied with its terms.<sup>1</sup> So, where the lessee has the preference right to purchase the premises, he may successfully defend against unlawful detainer brought by the lessor, when the lessor seeks to defeat the option by a fraudulent sale and conveyance.<sup>2</sup> But when the lessee defaults in his lease, before the expiration of the term, the relation of landlord and tenant exists

<sup>6</sup> Beckman v. Waters, 3 Cal. App. 734, 86 P. 997; see Jolliffe v. Steele, 9 Cal. App. 212, 98 P. 544.

<sup>7</sup> Crowley v. Byrne, 71 Wash. 444, 129 P. 113, option was recorded.

<sup>1</sup> Stanwood v. Kuhn, 132 Ill. App. 466; Washburn v. White, 197 Mass. 540, 84 N. E. 106; Sizer v. Clark, 116 Wis. 534, 93 N. W. 529, circumstances excusing tender; Powers v. Myers, 25 Okl. 165, 105 P. 674, holding Oklahoma statute does not authorize proceeding by vendor to recover possession from a vendee in default.

<sup>2</sup> Ogle v. Hubbel, 1 Cal. App. 357, 82 P. 217; but not when the price is fixed and tender is for a less amount, Bennett v. Farkas, 126 Ga. 228, 54 S. E. 942, a tender being necessary to the defense.

See Bettens v. Hoover, 12 Cal. App. 313, 107 P. 329, option to renew lease; refusal to make offer equal to that offered by third person, as provided in the lease, terminates right to renew. The defense that the offer of the third person was not *bona fide* must be affirmatively alleged.

during the life of the lease and an option in the lease does not constitute a defense.<sup>3</sup>

But ordinarily the relation of landlord and tenant does not arise from the mere permission of the optionor to the optionee to take possession. Consequently, when the optionee enters into possession for the purpose of prospecting for minerals, with the permission of the optionor, the optionee is in possession as a licensee and not as a tenant and, at the expiration of the option time, he becomes a trespasser and, therefore, the optionor is not entitled to a possessory warrant under the Georgia Statute.<sup>4</sup>

The extension of an option to purchase land which did not confer right of possession, does not tend to establish a right of possession.<sup>5</sup> Where the optionee buys the fee he is not estopped from denying further title in the optionor.<sup>6</sup>

The optionee is liable for rent until notice and tender, or offer to pay the purchase money,<sup>7</sup> but when the lease provides for arbitration of the price, the tenant (optionee) is not liable for rent during a reasonable time necessary to arbitrate.<sup>8</sup>

<sup>3</sup> *Clifford v. Gressinger*, 96 Ga. 789, 22 S. E. 399; see *Bettens v. Hoover*, 12 Cal. App. 313, 107 P. 329.

<sup>4</sup> *Henry v. Perry*, 110 Ga. 630, 36 S. E. 87; see *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571.

<sup>5</sup> *Kissack v. Bourke*, 132 Ill. App. 360.

<sup>6</sup> *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169; right to deny title of lessor when he is deprived of it by operation of law, *Spafford v. Hedges*, 231 Ill. 140, 83 N. E. 129.

<sup>7</sup> *Journe v. Hewes*, 124 Cal. 244, 56 P. 1032.

<sup>8</sup> *Washburn v. White*, 197 Mass. 540, 84 N. E. 106.

Sufficiency of allegation of answer setting up option as defense, *Walker v. Edmundson*, 111 Ga. 454, 36 S. E. 800.

SEC. 1126. INJUNCTION.—Specific enforcement of an agreement for the sale and purchase of property, has for its object the securing of a decree compelling the defendant to convey or transfer the title to the property to plaintiff. An injunction in a proper case will be granted to preserve the *status quo* during the pendency of the suit.<sup>1</sup> When the subject of the suit is land and notice of action has been recorded, it would seem an injunction to restrain the defendant from transferring is unnecessary as a purchaser subsequent to the record of the notice of action would be bound by the decree.<sup>2</sup> In those jurisdictions where the lessee-optionee may not, in unlawful detainer brought by the lessor, set up his right to renew the lease under an option therein by virtue of an election so to do properly and seasonably made, the tenant may sue to enjoin the unlawful detainer proceeding and to procure the specific performance of the covenant to renew.<sup>3</sup> But a tenant under a lease with option to purchase is not entitled to an injunction against summary proceedings by a landlord to recover possession and

<sup>1</sup> Right of tenant to possession, after termination of leasehold term, to remove improvements, etc., see *Bodwell W. P. Co. v. Old Town El. Co.*, 96 Me. 117, 51 Atl. 802; *Franklin etc. Co. v. Card*, 84 Me. 528, 24 Atl. 960; also pending arbitration proceedings, *Washburn v. White*, 197 Mass. 540, 84 N. E. 106.

<sup>2</sup> *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228, against optionor selling and mortgagor foreclosing; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94, to stay waste; *Geiger v. Green*, (Md.) 4 Gill. 472, the bill must show plaintiff is entitled to specific performance; also *Gelston v. Sigmund*, 27 Md. 334; *Carnegie Natural Gas Co. v. South Penn. Co.*, 56 W. Va. 402, 49 S. E. 548, oil and gas lease.

<sup>3</sup> *Josey v. Perlstein*, (Tex. Civ. App.) 107 S. W. 558.

<sup>4</sup> *Blount v. Connolly*, 110 Mo. App. 603, 85 S. W. 605; *Clifford v. Gresinger*, 96 Ga. 789, 22 S. E. 399; see *Pyke v. Northwood*, 1 Beav. 152, 17 Eng. Ch. 152, 48 Eng. Reprint 897.



for rent in arrears, when the election to purchase was insufficient because his tender did not include the rent past due.<sup>4</sup>

When it appears from the bill the agreement under which an option on mineral rights is claimed is not mutual so that specific performance will not be decreed against the optionor, the optionee is not entitled to an injunction to restrain the optionor from selling the mineral rights to a third person,<sup>5</sup> and so where the election is conditional, the optionee is not entitled to an injunction against the optionor restraining him from changing the status of the title to the land.<sup>6</sup>

Under a contract of employment for theatrical services which are special, unique and extraordinary in character and under which the employee stipulates not to perform similar services for any other person during the contract time, and containing an option in favor of the employer to renew or extend the term of services for a fixed period upon definite terms, and the option has been exercised, a court of equity will enjoin the employee from performing for third persons during the renewed or extended term.<sup>7</sup>

<sup>4</sup> *Campbell v. Babcock*, 13 N. Y. S. 843, 26 Abb. N. C. 35.

<sup>5</sup> *Peacock v. Deweese*, 73 Ga. 570.

<sup>6</sup> *Larned v. Wentworth*, 114 Ga. 208, 39 S. E. 855.

<sup>7</sup> See *Keith v. Kellerman*, 169 Fed. 196; *Canary v. Russell*, 30 N. Y. S. 122; as to injunction against baseball player, see Sec. 117, note 12.



## CHAPTER XII.

### SPECIFIC PERFORMANCE

- Sec. 1201. Generally.
- Sec. 1202. The subject of specific performance is the bilateral contract and not the option.
- Sec. 1203. Discretion of the court.
- Sec. 1204. Equitable essentials for specific performance. Generally.
- Sec. 1205. Inadequacy of consideration. Seal.
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- Sec. 1208. Same. Same. Cases.
- Sec. 1209. Inadequacy of remedy at law. Options on land.
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- Sec. 1211. Option in leases.
- Sec. 1212. Arbitration clauses.
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- Sec. 1214. Mutuality. Meaning of.
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- Sec. 1217. The same, continued. The option contract.
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- Sec. 1219. Mutuality. Old rule. *Cooke v. Oxley*.
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- Sec. 1224. Mutuality. Options and offers. Modern and established rule. Generally.
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- Sec. 1235. **Mutuality.** Miscellaneous cases.
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- Sec. 1237. **Mutuality.** So-called exceptions to rule.
- Sec. 1238. **Persons entitled to specific performance.**
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- Sec. 1241. **Parties plaintiff.**
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SECTION 1201. GENERALLY.—Specific performance has for its object the enforcement of an executory contract according to the precise terms agreed upon. The common law, of course, afforded no such specific redress. Limited by certain fixed rules, common law courts awarded money damages only against the breaching party to the contract. These money damages were looked upon as full and legal compensation to the injured party. A court of equity regards such damages, in special cases, as affording inadequate relief and so it has become a rule that, where in a particular case, breach of the contract can not be adequately compensated by awarding damages, a court of equity will compel the specific performance of the contract by requiring the breaching party to do the precise thing he agreed to do.

We are here concerned with options for the purchase of real property or personal chattels only. As a rule, damages for breach of an executory contract to sell and convey a particular tract of land are inadequate and specific performance is granted as a matter of course. As to the sale and delivery of personal chattels, specific performance is not granted except under special circumstances, since in the common run of cases, an action for damages furnishes an adequate remedy.

The right to specific enforcement of the contract is circumscribed, however, by certain rules, some of which are common to courts of law and some peculiar to courts of equity.

It is proposed in this chapter to bring together the decisions of the courts touching option contracts, and to show the application of these rules to such contracts in suits for their specific enforcement.

SEC. 1202. THE SUBJECT OF SPECIFIC PERFORMANCE IS THE BILATERAL CONTRACT AND NOT THE OPTION.—It is well to bear in mind the distinction pointed out in preceding chapters. If the optionee fails properly and timely to elect and make tender, where tender is a part of the act of election, his rights under the option are at an end. If, on the other hand, he properly and timely elects and tenders, the option contract is turned into a bilateral contract.<sup>1</sup> Speaking technically, it is not the option contract at all which, in the latter case, is the subject of specific performance; but rather, the bilateral contract raised by the election and tender,<sup>2</sup> and whether or not plaintiff is entitled to have specific performance, must be determined in accordance with the rules of equity applicable to bilateral contracts, keeping in mind the rule of relation, for the purpose of testing the equities and rights of the respective parties. The election and tender, that is,

<sup>1</sup> We use the expression "bilateral contract" here and elsewhere, but it must be understood it is used on the assumption that the election is one binding the optionee to purchase. See Sec. 417.

<sup>2</sup> *Rude v. Levy*, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 91, 127 A. S. R. 123; *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150; *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 38, 115 A. S. R. 880, 5 L. R. A. (N. S.) 1194; *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522.

the raising of the bilateral contract, must be deemed to have taken place as of the time of the execution of the option contract.<sup>3</sup> So, while it is true, in a technical sense, and particularly from the standpoint of mutuality, that the subject of the suit for specific performance is the bilateral contract and not the option, still, if there are any facts or circumstances attending the option contract, which like fraud, for instance, would be sufficient to justify the withholding of the remedy, courts of equity will consider such facts and circumstances.

#### SEC. 1203. DISCRETION OF THE COURT.—

It is a common place statement that the granting or the withholding of specific performance is in the sound judicial discretion of the court,<sup>1</sup> and is not a matter of right.<sup>2</sup> By this it is not meant the court may arbitrarily grant or deny specific performance. It means, merely, that when all the facts and circumstances of the case are before the court, the court grants or denies specific performance in accordance with the rules of equity upon the subject, rules which are now as well established and as uniformly applied as rules of law, and when, therefore, the contract sought to be specifically enforced,

<sup>3</sup> *Donnally v. Parker*, 5 W. Va. 301; see Secs. 514, 515.

<sup>1</sup> *Hollmann v. Conlon*, 143 Mo. 369, 45 S. W. 275; *Hennessey v. Woolworth*, 128 U. S. 438, 32 L. Ed. 500, 9 S. Ct. 109.

<sup>2</sup> *Thomas v. Gottlieb etc. Co.*, 102 Md. 417, 62 Atl. 633; *Page v. Martin*, 46 N. J. Eq. 585, 20 Atl. 46; *Bluegrass Realty Co. v. Shelton*, 148 Ky. 666, 147 S. W. 33.

conforms to such rules, specific performance is granted as a matter of course.<sup>3</sup>

When the ground of defense is unfairness of the contract or the hardship of the remedy, the court exercises its discretion in a true sense, since each case must stand and be decided upon its own facts and circumstances, but where the defense is fraud, misrepresentation, mistake, lack of mutuality, inadequate consideration, laches, uncertainty or incompleteness of the contract, and such like, a court of equity, in allowing or rejecting the defense, is merely deciding whether a case has been made which brings it within the rule of law on the subject.<sup>4</sup>

<sup>3</sup> *Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265, Ann. Cas. 1912C, 556; *Matthes v. Wier*, (Del. Ch.) 84 Atl. 878; *Roberts v. Braffett*, 33 Utah 51, 92 P. 789.

But caution is exercised, *Van Doren v. Robinson*, 16 N. J. Eq. 256, lease and option; *Rude v. Levy*, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 91, 127 A. S. R. 123; *Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874; *Davis v. Petty*, 147 Mo. 374, 48 S. W. 944, 946; *Stengel v. Sergeant*, 74 N. J. Eq. 20, 68 Atl. 1106; *Hollmann v. Conlon*, *supra*.

The same caution, however, is exercised in the specific enforcement of bilateral contracts. What is really meant is, for instance, that the court will not enforce unilateral contracts not timely and properly accepted, that is, option contracts without consideration, or rather mere offers. As said in *Woodward v. Davidson*, 150 Fed. 840 (reversed on other grounds 156 Fed. 915), "an option to buy real estate given for a valuable consideration is, in the eyes of the law, as sacred as any other lawful contract and is enforceable by suit in equity." See *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637.

The real test is whether, from all the circumstances, specific performance will subserve the ends of justice and work no hardship on the defendant, *Pearson v. Millard*, 150 N. C. 303, 63 S. E. 1053.

Denied though no fraud is imputable to plaintiff where defendant is old, infirm, etc., *Bell v. Howard*, 9 Mod. 302, 88 Eng. Reprint 467.

<sup>4</sup> *Wetherby v. Griswold*, (Ore.) 147 P. 388; *Western Sec. Co. v. Atlee*, (Iowa) 151 N. W. 56; *Clough v. Cook*, (Del. Ch.) 87 Atl. 1017, 1019.



## SEC. 1204. EQUITABLE ESSENTIALS FOR SPECIFIC PERFORMANCE. GENERALLY.

—A timely and proper election, by the optionee and tender, when necessary, do not alone entitle him to specific performance. Such acts, however, are conditions precedent to his right to obtain specific performance.<sup>1</sup> But having elected and tendered, where tender is necessary, his case must then meet the requirements of the rules on the subject.

A decree of specific performance will not be granted when, because of circumstances, the decree can not be executed, or when it would be nugatory, or when the contract is so uncertain or incomplete in its terms that the court can not form a proper decree;<sup>2</sup> or when, under the circumstances, the execution of the decree would require supervision by the court involving continuous acts on its part, and thus unduly tax the time of the court.<sup>3</sup> In the latter cases, however, the court acts on its own discretion.

Of course, the option contract must not have been secured through fraud or by misrepresentation;<sup>4</sup>

<sup>1</sup> *Rude v. Levy*, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 91, 127 A. S. R. 123; *Finn v. Bowden*, 66 Fla. 41, 63 So. 139; *Cates v. McNeil*, (Cal.) 147 P. 944.

<sup>2</sup> See Secs. 209-213; *Tippins v. Phillips*, 123 Ga. 415, 51 S. E. 410, description; *Clinchfield Coal Co. v. Powers*, 107 Va. 393, 59 S. E. 370, misunderstanding as to acreage; *New England Box Co. v. Prentiss*, 75 N. H. 246, 72 Atl. 826, terms of agreement unilateral; *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404; *Zimmerman v. Rhodes*, 226 Pa. 174, 75 Atl. 207, amount of royalty, term of contract, and quantity of coal to be mined.

<sup>3</sup> *Stanton v. Singleton*, 126 Cal. 657, 59 P. 146, 47 L. R. A. 334, stamp mill; *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426, 437.

<sup>4</sup> *Van Deusen v. Brown*, 167 Mich. 49, 132 N. W. 472; *Clough v. Cook*, (Del. Ch.) 87 Atl. 1017, misrepresentation must have been relied on.

its execution must not have been procured by undue influence; there must not be mistake in the essential terms of the contract; the contract must not be illegal, immoral, or against public policy; it must not be unfair in its terms;<sup>5</sup> and the decree, if granted, must not injuriously or harshly affect the defendant,<sup>6</sup> or even third persons;<sup>7</sup> and particularly when not beneficial to plaintiff.<sup>8</sup> Plaintiff

<sup>4</sup> The mere fact that the option was taken as a speculation does not render it fraudulent, *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881, 1 Ann. Cas. 986.

<sup>5</sup> *Marsh v. Lott*, 8 Cal. App. 384, 97 P. 163; *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558, 27 Ky. L. Rep. 724, oil lease; *Thomas v. Gottlieb etc. Co.*, 102 Md. 417, 62 Atl. 633; *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428; *Clark v. Rosario M. & M. Co.*, 176 Fed. 180, 99 C. C. A. 534; *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871; *Forgey v. Gilbirds*, 262 Mo. 44, 170 S. W. 1135.

In *Matthes v. Wier*, (Del. Ch.) 84 Atl. 878, the court says, "The contract (to be specifically enforceable) must be concluded, certain, unambiguous, mutual and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation or misapprehension, fraud, or mistake, imposition or surprise; not an unconscionable or hard bargain; and its performance not oppressive upon the defendant, and finally it must be capable of specific execution through a decree of the court."

<sup>6</sup> *Hopwood v. McClausland*, 120 Iowa 218, 94 N. W. 469; *Meidling v. Trefz*, 48 N. J. Eq. 638, 23 Atl. 824.

Plaintiff will not be entitled to specific performance or to damages, when he refuses to accept lease containing option to purchase because of certain litigation to which defendants were not parties and for which they are not responsible, *Livesley v. Muckle*, 46 Ore. 420, 80 P. 901.

<sup>7</sup> *Stanton v. Singleton*, 126 Cal. 657, 59 P. 146, 47 L. R. A. 334; *Rathbone v. Groh*, 137 Mich. 373, 100 N. W. 588; *Davenport v. Latimer*, 53 S. C. 563, 31 S. E. 630, innocent purchaser; see *Curran v. Holyoke Water Power Co.*, 116 Mass. 90; *Dowling v. Bergin*, 47 Mich. 188, 10 N. W. 194, third party in possession; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773.

<sup>8</sup> *Chicago & A. R. Co. v. Schoeneman*, 90 Ill. 258; *King v. Hamilton*, 29 U. S. 311, 7 L. Ed. 869; *Texas & P. Ry. Co. v. City of Marshall*, 136 U. S. 393, 34 L. Ed. 385, 10 S. Ct. 846.

must come into court with clean hands,<sup>9</sup> and show performance on his part.<sup>10</sup>

An option will not be specifically enforced where there are facts or circumstances surrounding the transaction which render it unjust or inequitable to do so.<sup>11</sup> For instance, specific performance will not be decreed against the optionor who is not able, for want of title, to comply with the contract;<sup>12</sup> or, when a decree would, under special circumstances, give an unfair advantage to the optionee;<sup>13</sup> or,

<sup>9</sup> *York v. Searles*, 189 N. Y. 573, 82 N. E. 1134, affirming s. c. 90 N. Y. S. 37, 97 App. Div. 331; *Reynolds v. Boland*, 202 Pa. 642, 52 Atl. 19; *Houtz v. Hellman*, 228 Mo. 655, 128 S. W. 1001; *Washburn v. White*, 197 Mass. 540, 84 N. E. 106; *George Gunther Jr. Brew. Co. v. Brywezynski*, 107 Md. 696, 69 Atl. 514.

*McLaughlin v. Leonhardt*, 113 Md. 261, 77 Atl. 647, holding that specific performance of an agreement to give plaintiff an option to purchase corporate stock will not be granted when the evidence shows bad faith on the part of plaintiff and the person acting for him.

Where a real estate broker, employed to purchase property, took an option in his own name, there was a breach of faith and conveyance having been made to the principal, he was not entitled to specific performance, *Pace v. Cline*, (Colo.) 147 P. 672.

<sup>10</sup> *Loneragan v. Goodman*, 241 Ill. 200, 89 N. E. 349; *Rude v. Levy*, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 191, 127 A. S. R. 123; *Briles v. Paulson*, (Cal.) 149 P. 169.

<sup>11</sup> *Aiple etc. Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652; *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S. E. 524, 123 A. S. R. 990, 9 L. R. A. (N. S.) 913, inequality resulting from ignorance, etc., of optionor.

<sup>12</sup> *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522.

<sup>13</sup> *Starcher v. Duty*, 61 W. Va. 373, 56 S. E. 524, 123 A. S. R. 990, 9 L. R. A. (N. S.) 913.

See *Green River Coal Min. Co. v. Brown*, 140 Ky. 332, 131 S. W. 13, holding defense that enforcement of option agreement optionee would work injustice to him, will not defeat specific performance, unless he shows, by preponderance of the evidence, the absence of coal of workable quality and condition under the land.

where the conduct of the optionee has induced the optionor to infer an abandonment of the option to buy, and by acting upon such inference, the optionor has been injured.<sup>14</sup>

SEC. 1205. INADEQUACY OF CONSIDERATION. SEAL.—Another rule is that the consideration must be valuable and adequate.<sup>1</sup> The consideration referred to is the consideration to support the contract raised by the election to purchase under the option. The consideration of the option contract is a separate and distinct matter. A nominal money, or any other valuable consideration, will uphold the option contract in the sense that it will make it binding upon the optionor during its time limit.<sup>2</sup> However, the smallness of the consideration to support an option has been taken into account by some of the courts in determining the fairness of the transaction, and a few have held that a small money consideration is inadequate, and refused specific performance. But these decisions are against the great weight of authority and, as a rule, were made upon a set of circumstances which rightly justified the denial of specific performance upon some other equitable ground.

Inadequacy of the price for the property, when it is so gross and palpable as, of itself, to appear evidence of actual fraud, may be sufficient to induce

<sup>14</sup> *Meidling v. Trefz*, 48 N. J. Eq. 638, 23 Atl. 824; see *Orby v. Trigg*, 9 Mod. 2, 88 Eng. Reprint 276.

<sup>1</sup> *Rice v. Gibbs*, 33 Neb. 460, 50 N. W. 436; see Sec. 324.

<sup>2</sup> See Secs. 328, 330.

the court to stay the exercise of its discretionary power to enforce specific performance and leave the party to his remedy at law; but inadequacy of price merely, without being such as to prove fraud conclusively, is not a good objection against decreeing specific performance.<sup>3</sup>

In some jurisdictions a seal imports a consideration, but the effect of a seal, in equity, is to raise a presumption of consideration only. Parol evidence is admissible to show that no consideration was in fact rendered or paid, notwithstanding the seal.<sup>4</sup>

SEC. 1206. STATUTE OF FRAUDS.—This subject has been discussed in Chapter IV, and, therefore, it is sufficient to point out here that a contract sought to be specifically enforced, if it falls within its provisions, must meet the requirements of that statute, which requirements are, speaking generally, that the option contract must be in writing, identify the parties, set forth the terms of the agreement, describe the subject matter sufficiently for identification, be subscribed by the party to be charged, and, in some jurisdictions, the consideration must be recited or shown.<sup>1</sup>

By force of the statute, a memorandum of the contract is sufficient. Parol evidence is not admissible to supply any essential term of the agreement.<sup>2</sup>

<sup>3</sup> *Van Norsdall v. Smith*, 141 Mich. 355, 104 N. W. 660; *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535; see Sec. 324.

<sup>4</sup> *Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; see Secs. 332, 333.

<sup>1</sup> See Sec. 406.

<sup>2</sup> Sec. 406.

By the weight of authority, an agreement extending the option time to elect falls within the statute.<sup>3</sup> In some jurisdictions the authority of the agent to execute, on behalf of his principal, an agreement required by law to be in writing, must also be in writing, and be subscribed by the principal.<sup>4</sup>

An option contract, though evidenced by a writing sufficient under the Statute of Frauds, is not necessarily a contract which may be specifically enforced where the price of the property is inadequate and an unfair advantage was taken of the optionor in securing the execution of the option.<sup>5</sup> An option contract for sale of the land though signed by the optionor only, if otherwise sufficient, will, if there is a timely and proper election by the optionee, be specifically enforced at the suit of the latter notwithstanding objection of want of mutuality of remedy.<sup>6</sup> In such case, want of mutuality is cured by the optionee's bill for specific performance, the remedy thereby becoming mutual.<sup>7</sup>

SEC. 1207. STATUTE OF FRAUDS. PART PERFORMANCE.—A court of equity, in the exercise of its general jurisdiction to relieve against

<sup>3</sup> See Secs. 409, 413.

<sup>4</sup> See Sec. 405.

<sup>5</sup> *Leuschner v. Duff*, 7 Cal. App. 721, 95 P. 914.

<sup>6</sup> *Cheney v. Cook*, 7 Wis. 413; *Gira v. Harris*, 14 S. D. 537, 86 N. W. 624; *Vance v. Newman*, 72 Ark. 359, 80 S. W. 574, 105 A. S. R. 42; *Moses v. McClain*, 82 Ala. 370, 2 So. 741; *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 30 A. S. R. 47, 11 L. R. A. 148; see Secs. 1213, *et seq.*

<sup>7</sup> *Peevey v. Houghton*, 72 Miss. 918, 17 So. 378, 18 So. 357, 48 A. S. R. 592; *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703.

fraud, has power to grant specific performance of oral contracts relating to land where there has been part performance of the contract on the part of plaintiff. The jurisdiction, however, is not exercised because of any binding effect of the oral contract, but in order to prevent fraud, and hence, it is only in those cases where, to deny specific performance, would be to work a fraud upon plaintiff, that he is entitled to such relief.<sup>1</sup>

There must be an oral contract,<sup>2</sup> and the acts constituting part performance must be referable to the oral contract.<sup>3</sup> A tenant who had been occupying a building and presuming that on termination of his lease, he would be compelled to vacate, secured an option on another building. Subsequently, he contracted orally with the landlord of the building which he occupied, for a lease for a greater term than one year, and it was held he could not maintain a suit for specific performance on the ground that part performance had taken the lease out of the statute, as his possession was a mere uninterrupted continuation of a former possession

<sup>1</sup> *Wallace v. Rappleye*, 103 Ill. 229; *Small v. Owings*, 1 Md. Ch. 363; *Wheeler v. Reynolds*, 66 N. Y. 227; *Sullivan v. O'Neal*, 66 Tex. 433, 1 S. W. 185; *Kidder v. Hunt*, 18 Mass. (1 Pick.) 328, 11 Am. Dec. 183.

<sup>2</sup> See *Hartwell v. Black*, 48 Ill. 301; *Gibbs v. Whitwell*, 164 Mo. 387, 64 S. W. 110; *Price v. Lloyd*, 31 Utah 86, 86 P. 767, 8 L. R. A. (N. S.) 870.

<sup>3</sup> Possession by tenant under a lease and option to purchase and improvements made by him on the leased premises, are referable to his rights as tenant under the lease and not to his rights under the option, *Abbott v. 76 Land Co.*, 101 Cal. 567, 36 P. 1, 53 P. 445; see *Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255; *Broadway H. & S. v. Decker*, 47 Wash. 586, 92 P. 445.

and the abandonment of the option was not in pursuance of any contract with the landlord.<sup>4</sup>

Payment of part or of the whole of the price is not alone such part performance as to entitle the plaintiff to relief;<sup>5</sup> nor, is mere naked possession; nor, are improvements without possession sufficient.<sup>6</sup> Speaking generally, to constitute part performance, plaintiff must have taken possession, under the contract, with the consent, expressed or implied, of the defendant, and paid some part of the purchase price, or constructed valuable and permanent improvements on the land.<sup>7</sup>

SEC. 1208. SAME. SAME. CASES.—Where plaintiff had a written option to purchase land and exercised it within the prescribed time, entered into possession of the land, and expended money thereon, he is entitled to specific performance

<sup>4</sup> Henry Jennings & Sons v. Miller, 48 Ore. 201, 85 P. 517; J. L. Gates Land Co. v. Ostrander, 124 Wis. 287, 102 N. W. 558, holding relinquishment of option on facts, not act of part performance.

<sup>5</sup> Cooper v. Colson, 66 N. J. Eq. 328, 58 Atl. 337, 105 A. S. R. 660.

This is a correct statement of the rule in most jurisdictions, Rogan v. Arnold, 233 Ill. 19, 84 N. E. 58; Peckham v. Balch, 49 Mich. 179, 13 N. W. 506; Halsell v. Renfrow, 202 U. S. 287, 50 L. Ed. 1032, 26 S. Ct. 610.

But in Delaware part payment, if shown in writing, is such part performance as removes the bar of the statute of frauds, Matthes v. Wier, (Del. Ch.) 84 Atl. 878.

<sup>6</sup> Hanes v. Newport, 134 Ill. App. 453. This was a case of naked possession and the bill did not allege that the optionee (lessee) had paid the rentals, or elected, or made improvements.

<sup>7</sup> Smith v. Taylor, 2 Wash. 422, 27 P. 812, improvements small, etc.; West v. Wash. etc. Railroad, 49 Ore. 436, 90 P. 666; Finlen v. Heinze, 32 Mont. 354, 80 P. 918; Bigler v. Baker, *supra*; Popp v. Swanke, 68 Wis. 364, 31 N. W. 916, mere deposit of title papers in escrow not sufficient. See Powell v. Lovegrove, 8 DeG. M. & G. 357, 2 Jur. (N. S.) 791, 44 Eng. Reprint 427.



against the owner.<sup>1</sup> So, where the parol agreement has been acted upon and the condition of the parties thereby changed.<sup>2</sup>

A lessee having made improvements on the leased lands will be granted specific performance of his option in the lease to purchase.<sup>3</sup> And so will the assignee of the optionee where the assignee has been accepted by the optionor, and has paid amounts on the purchase price, and entered into possession.<sup>4</sup> And so, where, under an oral agreement therefor, an option has been procured, the corporation formed, and the stock issued to the parties.<sup>5</sup>

**SEC. 1209. INADEQUACY OF REMEDY AT LAW. OPTIONS ON LAND.**—The general rule is that equity will not award specific performance where there is an adequate and complete remedy at law.<sup>1</sup> This rule applies to option contracts but, of

<sup>1</sup> *Wall v. Minneapolis etc. R. Co.*, 86 Wis. 48, 56 N. W. 367, this case involved a verbal modification of the option.

<sup>2</sup> *Wilkins v. Evans*, 1 Del. Ch. 156; but not where no election is made, *J. L. Gates L. Co. v. Ostrander*, 124 Wis. 287, 102 N. W. 558.

<sup>3</sup> *Richardson v. Harkness*, 59 Wash. 474, 110 P. 9; but not where optionee abandons option, *Eagle v. Pettus*, 109 Ark. 310, 159 S. W. 1116. *Finlen v. Heinze*, 32 Mont. 354, 80 P. 918; case of a mine where "slight expenditures" in improvements were made.

<sup>4</sup> *Cramer v. Mooney*, 59 N. J. Eq. 164, 44 Atl. 625; one of the points here was that the contract was signed by the vendor only.

<sup>5</sup> *Kent v. Costin*, (Minn.) 153 N. W. 874.

<sup>1</sup> *New England Box Co. v. Prentiss*, 75 N. H. 246, 72 Atl. 826, lumber to be cut from certain land; *Paddock v. Davenport*, 107 N. C. 710, 12 S. E. 464, trees.

The fact that optionee contracts to sell the land to a third person, does not preclude him from maintaining a suit for specific performance of the option contract on the ground that he has an adequate remedy at law, *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040,

course, with the usual qualifications. For instance, where the option is on an estate in land, specific performance is granted as a matter of course. That is to say, it is taken for granted the legal remedy is inadequate.<sup>2</sup> Again, there is a view which finds support in the decisions that the very thing contracted for in an option is the right to have specific performance of it, and this view has a tendency towards relaxing the general rule that specific performance will not be granted when there is an adequate remedy at law. But there may be special circumstances, especially where the rights of third persons will be injuriously affected, upon consider-

118 A. S. R. 586, 12 Ann. Cas. 88, nor does the fact that the optionor conveys to a grantee having knowledge of the option for which the optionee may have a remedy at law for damages, *City of Birmingham v. Forney*, 173 Ala. 1, 55 So. 618.

<sup>1</sup> But the optionee has an adequate remedy at law for damages where the optionor sold directly to the party to whom the optionee had given an option, *Marthinson v. King*, 150 Fed. 48, 82 C. C. A. 360; and so where lessor was to have paid to him one-tenth of the price for which the lessee (under a lease in perpetuity) sold the premises, *Livingston v. Stickles*, 8 Paige (N. Y.) 398.

<sup>2</sup> *Aiple etc. Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652; *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979; *Cummings v. Nielson*, 42 Utah 157, 129 P. 619; *Christiansen v. Aldrich*, 30 Mont. 446, 76 P. 1007; *Carnegie Natural Gas Co. v. South Penn Oil Co.*, 56 W. Va. 402, 49 S. E. 548, oil and gas lease; *Matthes v. Wier*, (Del. Ch.) 84 Atl. 878; *Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265, Ann. Cas. 1912C, 556; *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637; *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972; *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 932, timber; *Tidball v. Challburg*, 67 Neb. 524, 93 N. W. 679, grain elevator.

The remedy at law, however, must be as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity, *Castle Creek W. Co. v. City of Aspen*, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660. When an accounting is necessary, the remedy in equity is more complete. *Id.*

The fact that plaintiff is entitled to condemn the optioned land is a fact to be taken into consideration, but is not a bar, *Rice v. Lincoln etc. R. Co.*, 88 Neb. 307, 129 N. W. 425.

ation of which the court will deny specific performance and leave the party to his remedy at law. Thus, specific performance of an option to purchase land by R of G, before April 1st, will be denied as inequitable, where A became a *bona fide* purchaser May 7th, though he did not record his deed till after the option was recorded, June 3rd, and not only paid the price but made improvements in ignorance of the option, where R will suffer but little, if any loss, and has a remedy at law for any breach of contract by G who sold to A for less than R agreed to pay, on the understanding that R refused to purchase because a release of mortgage could not be obtained.<sup>3</sup>

SEC. 1210. INADEQUACY OF REMEDY AT LAW. OPTIONS ON PERSONAL CHATTELS. SHARES OF STOCK.—The general rule is that a court of equity will not entertain jurisdiction for the specific performance of an option respecting goods, chattels, shares of stock and choses in action when compensation by way of damages furnishes a complete and satisfactory remedy.<sup>1</sup>

The reason usually given is that, with the damages awarded for breach of the contract, plaintiff

<sup>3</sup> Rathbone v. Groh, 137 Mich. 373, 100 N. W. 588.

<sup>1</sup> Hissam v. Parrish, 41 W. Va. 686, 24 S. E. 600, 56 A. S. R. 892. This decision is correct on the point cited, but is not in accord with the established rule on mutuality; see Sec. 1215 *et seq.*; New England Box Co. v. Prentiss, 75 N. H. 246, 72 Atl. 826.

will be enabled to procure, in the market, other articles as good in all respects as those contracted for. The legal remedy to recover damages, therefore, being adequate, specific performance will not be decreed.

But there are exceptions. When, for instance, the chattel contracted for is a work of art, or a rare article, or one in which the purchaser has a sentimental interest, or where the specific article itself is desired, and in other like cases in which the particular article can not be duplicated or purchased elsewhere, courts of equity quite uniformly grant specific performance.<sup>2</sup>

In accordance with the general rule, specific performance of an option contract to purchase shares of stock will not be granted if the stock is one which has a market value and can be readily obtained on the market.<sup>3</sup> On the other hand, if the stock has not a market value and is not upon the market for sale, and, therefore, can not be obtained

<sup>2</sup> See *Graham v. Herlong*, 50 Fla. 521, 39 So. 111; *Sullivan v. Tuck*, 1 Md. Ch. 59.

Growing trees, granted, *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 932. See, however, *Paddock v. Davenport*, 107 N. C. 710, 12 S. E. 464, where trees were bought with a view to their severance from the soil and specific performance denied.

Stock of goods and good will of business carried on on leased premises, with option to renew lease, *Fred Gorder & Son v. Pankonin*, 83 Neb. 204, 119 N. W. 449.

<sup>3</sup> *Noyes v. Marsh*, 123 Mass. 286, agreement to repurchase; *Moulton v. Warren Mfg. Co.*, 81 Minn. 259, 83 N. W. 1082; *Butler v. Wright*, 186 N. Y. 259, 78 N. E. 1002; *Bacon v. Grosse*, 165 Cal. 481, 132 P. 1027; *Ryan v. McLane*, 91 Md. 175, 46 Atl. 340, 50 L. R. A. 501, 80 A. S. R. 438, pooled stock, not granted.

except from the seller,<sup>4</sup> and in other special cases,<sup>5</sup> specific performance will be granted.

**SEC. 1211. OPTION IN LEASES.**—Equity will decree specific performance of a covenant in a lease which provides that the lessee shall have the privilege of purchasing the leased premises for a fixed sum of money on or before the expiration of the lease, and will also decree the specific performance of an option to renew the lease.<sup>1</sup>

<sup>4</sup> *Eichbaum v. Sample*, 213 Pa. 216, 62 Atl. 837, option to repurchase; *First Nat'l Bank of Hastings v. Corp. Sec. Co.*, 128 Minn. 341, 150 N. W. 1084; see *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 115 A. S. R. 880, 5 L. R. A. (N. S.) 1194; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432; 27 L. R. A. 271.

*Seruggs v. Cotterill*, 73 N. Y. S. 882, 67 App. Div. 583, option between stockholders, upon death of either, granted, but not necessarily where the breach by one stockholder has not resulted in actual injury to plaintiff, *Brown v. Britton*, 58 N. Y. S. 353, 41 App. Div. 57.

*Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57, escrow of stock by stockholder for six months.

*Jones v. Brown*, 171 Mass. 318, 50 N. E. 648, option between stockholders.

<sup>5</sup> *Krouse v. Woodward*, 110 Cal. 638, 42 P. 1084; *Gilfallan v. Gilfallan*, 168 Cal. 23, 141 P. 623; *Hogg v. McGuffin*, 67 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491.

<sup>1</sup> *Hall v. Center*, 40 Cal. 63, option to purchase; *Chas. J. Smith Co. v. Anderson*, (N. J. Eq.) 95 Atl. 358; *Wright v. Kayner*, 150 Mich. 7, 113 N. W. 779, option to renew or to purchase; *Herman v. Babcock*, 103 Ind. 461, 3 N. E. 142, option reserved to lessor to convey at price to be fixed by three disinterested persons.

*Hunter, In re*, 1 Edw. Ch. (N. Y.) 1, option to purchase, overruling *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 282, and *Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484, saying that Chancellor Kent, there intimated lack of mutuality, but in the later case of *Clason's Ex'rs v. Bailey*, 14 Johns. (N. Y.) 484, he held to the rule stated in the text.

While formerly there was a marked difference of opinion among the courts as to the validity of pure options, there seems to have been but little divergence among the courts as to the enforceability of

The lease furnishes the consideration to support the option to purchase.<sup>2</sup> Like any other contract, specific performance of an option in the lease is not a matter of right. The right to such relief rests in the sound discretion of the court.<sup>3</sup> The effect of the election is to end the lease and to entitle the lessee to specific performance.<sup>4</sup> Where a covenant in a lease to renew operated as a material inducement to its execution, it is not a unilateral agreement, or *nudum pactum*, but a substantial part of the contract.<sup>5</sup> The contract to sell and purchase becomes a mutual obligation upon acceptance by the lessee.<sup>6</sup>

The rule of mutuality applies to an option in a lease as it does to all contracts the specific performance of which is sought. When, therefore, the executory contract for the possession and development of oil lands leaves it optional with the lessee whether or not he will proceed with the contemplated work, it is optional with the lessor, and

such options when connected with leases, *Murphy Thompson & Co. v. Reid*, 125 Ky. 585, 101 S. W. 964, 966, 31 Ky. L. Rep. 176, 10 L. R. A. (N. S.) 195, overruling *Boucher v. Van Buskirk*, 9 Ky. (2 A. K. Marsh) 345.

<sup>1</sup> As to "refusals" to renew lease, see Secs. 211, 212.

<sup>2</sup> *House v. Jackson*, 24 Ore. 89, 32 P. 1027; *McCormick v. Stephany*, 57 N. J. Eq. 257, 41 Atl. 840; *Schroeder v. Gemeinder*, 10 Nev. 355; *Bacon v. Kentucky C. Ry. Co.*, 95 Ky. 373, 25 S. W. 747, 16 Ky. L. Rep. 77; see Sec. 321.

<sup>3</sup> *Page v. Martin*, 46 N. J. Eq. 585, 20 Atl. 46.

<sup>4</sup> *Newell's Appeal*, 100 Pa. 513.

<sup>5</sup> *Monihon v. Wakelin*, 6 Ariz. 225, 56 P. 735; *Wright v. Kaynor*, 150 Mich. 7, 113 N. W. 779; *McCormick v. Stephany*, 57 N. J. Eq. 257, 41 Atl. 840; *King v. Prospect Point Fishing Co.*, (Md.) 94 Atl. 780.

<sup>6</sup> *Simon v. Schmitt*, 118 N. Y. S. 326.

specific performance will not be granted at the suit of the lessee who has not performed.<sup>7</sup>

SEC. 1212. ARBITRATION CLAUSES.—Options, and particularly those contained in leases, often provide for the appointment of arbitrators or valuers to fix the price to be paid upon exercise of the option to purchase, or the rental for the renewed or extended term of the lease.<sup>1</sup>

The American rule on this subject is that where, in a contract for the sale of property, at a price to be fixed by appraisers to be chosen by the parties, the stipulation for appraisers is not a condition, nor the essence of the agreement, but is subsidiary or auxiliary to its main purpose and scope, and where the parties can not be left or placed in *status quo*, if specific performance is denied, a court of equity may determine the price itself, or by a

<sup>7</sup> *Superior Oil & Gas Co. v. Mehlin*, 25 Okl. 809, 108 P. 545, saying oil and gas leases do not enjoy the presumptions usually indulged in favor of ordinary leases and that the former are construed most strongly against the lessee and in favor of the lessor, citing *Southern Ry. Co. v. Franklin & P. Ry. Co.*, 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297; *Huggins v. Daley*, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732; *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558, 27 Ky. L. Rep. 724; *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 A. S. R. 721; *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428.

<sup>1</sup> Strictly speaking, this proceeding is not an arbitration; there is no dispute between the parties; it is a procedure to fix the price, *Florida Yacht Club v. Renfro*, 67 Fla. 154, 64 So. 742; *Dore v. Southern Pacific Co.*, 163 Cal. 182, 124 P. 817. Hearings and notice to the parties would not, therefore, seem to be necessary, *Id.*

*Castle Creek W. Co. v. City of Aspen*, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660; *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219, 69 P. 176; *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161; *Herman v. Babcock*, 103 Ind. 461, 3 N. E. 142; *Dunnell v. Keteltas*, 16 Abb. Pr. (N. Y.) 205.

master, or by appraisers of its own selection, and may then enforce specific performance.<sup>2</sup> But, where the stipulation for appraisers to fix the

<sup>2</sup> In *Town of Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740, which involved an option on waterworks, where the city elected and the optionor refused to sell or to appoint an arbitrator, the Court said: "The town of Bristol had the right, under the contract aforesaid, to purchase the waterworks in question, at a price to be mutually agreed upon by the parties thereto, or, in case of a failure so to agree, to have the price fixed by arbitrators, chosen as aforesaid. It has elected to exercise said right. The Bristol & Warran Waterworks, which confessedly stands, so far as said contract is concerned, in the shoes of said Norman, with the same rights and liabilities which appertained to him, has refused either to agree upon a price for said waterworks or to appoint arbitrators to fix the same. In other words, it has deliberately violated the express terms of said contract in this regard; and it is suggested that, unless this court has jurisdiction to either compel a specific performance thereof or to grant the relief prayed for, said waterworks company may continue to hold said property, and enjoy the privileges and immunities secured by said contract, for the remainder of the term of fifty years, in continual violation of said contract. But, however this may be, we think there is no doubt as to the jurisdiction of this court to grant the relief prayed for. Said company having failed to comply with the terms of said contract in the particulars aforesaid, this court clearly has the authority to provide some means for the fixing of the price at which said waterworks shall be conveyed to said town, and to order such conveyance; and we think that the regular and proper mode to accomplish this object is by first referring the case to a master, to ascertain and determine the price at which said works shall be conveyed. If the case was that of a simple agreement or contract for the sale of land or other property at a price to be fixed by arbitrators, where one of the parties had refused to appoint an arbitrator, the court probably could not, upon the application of the other party, either fix a price itself or appoint arbitrators, for the reason suggested in the demurrer, viz: that the contract, being simply for a sale at a price to be fixed in a certain manner, the parties could not be compelled either to sell or buy at a price not so fixed. Such is the English doctrine. *Milnes v. Gery*, 14 Ves. 400; *Wilks v. Davis*, 3 Mer. 507; *Vickers v. Vickers*, L. R. 4 Eq. 529. The same rule has been followed in this country when there have been no circumstances to distinguish the case from *Milnes v. Gery*, *Pom. Spec. Perf. Cont.*, Sec. 150. The cases of *City of Providence v. St. John's Lodge*, 2 R. I. 46, and *Dike v. Greene*, 4 R. I. 285, would seem at first blush to establish a different rule. But in these cases the contract



price, or value, is a condition, and not a covenant merely, a court of equity will not itself fix the price, and then enforce specific performance,<sup>3</sup> unless

was to sell at a price to be fixed by appraisement, with no stipulation as to how the appraisers should be appointed. The Court held in these circumstances that it could itself appoint a master to make the appraisal, and would decree a specific performance at the price so determined. But, as well stated by complainant's counsel, where the contract to sell does not stand alone, but is merely a subsidiary part of another contract for a more extensive purpose, the performance of which has already been entered upon, a different rule prevails. In such a case the courts hold that the manner of determining the price is a matter of form, rather than of substance; and if it becomes evident that it can not be determined in the manner provided for in the contract, by reason of the refusal of one party to do what in equity he ought to do, the court will determine it upon the application of the other. *Coles v. Peck*, 96 Ind. 333. In other words, if the parties have incurred obligations under the contract so that they can not be placed in *status quo*, the court will itself enforce the agreement.''

<sup>3</sup> In *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380, it is held the first consideration is whether the provision for the appointment of arbitrators to ascertain the value is a covenant or condition; if it is a covenant, a court of equity may specifically enforce it; otherwise, if it is a condition, as the consequence of the non-fulfillment of the condition is a forfeiture of the estate and that the limit to which a court will go in fixing the price is to ascertain it when the contract simply provides it shall be fair without naming the arbitrators or fixing the method of their selection.

Where parties to an executory agreement for the sale of goods agree that the price to be paid for the property shall be fixed by valuers appointed by them, there is no contract of sale if the persons appointed as valuers fail or refuse to act; and this is true even where one of the parties to such an agreement is the cause of such failure or refusal, *Elberton Hardware Co. v. Hawes*, 122 Ga. 858, 50 S. E. 964. But where the agreement has been executed by delivery of the goods and the purchaser does any act which prevents their valuation as the agreement provides, the vendor is entitled, in a proper action, to recover the value of the goods estimated by the court, *Elberton Hardware Co. v. Hawes*, *supra*.

*Montgomery Gas Light Co. v. City Council*, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616, holding the rule does not apply where the thing to be appraised is only a minor part of the subject matter, as, for instance, where land is purchased at a fixed price, but the contract of sale also includes fixtures and such like, the valuation of which is to be determined by third persons.

there are facts and circumstances which entitle plaintiff to relief upon some other equitable ground.

Thus, though an option to buy land provided that the price should be fixed by two arbitrators, one to be appointed by each of the parties, and if they could not agree, a third was to be appointed by the two, the court fixed the price where the two arbitrators were unable to agree thereon, or on the appointment of a third arbitrator, it appearing that the optionee entered into possession under the lease giving him the option to purchase and remained in possession and made improvements.<sup>4</sup>

So, a lease for a term of years containing a stipulation that, at the end of the term, the lessee should have the right to purchase the land at a price to be fixed by three disinterested persons, one to be chosen by each party and the third by the two chosen, confers upon the lessee a right of purchase which a court of equity will specifically enforce, where the lessor refused to choose his appraiser and when, during the term of the lease, the lessee made valuable improvements.<sup>5</sup>

The optionee and the owner of the legal title are the proper parties to select the arbitrators, and, when the option so provides, a majority may fix the price, and the time and manner of payment,<sup>6</sup> but where the submission is not made under a statute, nor under an express agreement that a

<sup>4</sup> Richardson v. Harkness, 59 Wash. 474, 110 P. 9; see Piggot v. Mason, 1 Paige (N. Y.) 412; Kaufmann v. Liggett, 209 Pa. 87, 58 Atl. 129, 67 L. R. A. 353, 103 A. S. R. 988, option to renew lease.

<sup>5</sup> Herman v. Babcock, 103 Ind. 461, 3 N. E. 142.

<sup>6</sup> Florida Yacht Club v. Renfroe, 67 Fla. 154, 64 So. 742.

majority of the referees may act, but pursuant to the term of a lease providing therefor, in fixing the price under an option to purchase, an award or finding of two of three referees is not binding.<sup>7</sup>

The orphan's court has no jurisdiction to exercise a power to appraise real estate under a power of sale in a will giving certain persons an option to purchase, at the appraised value, where the donee of the power is not named, but such power may be exercised by a court of equity.<sup>8</sup>

Where the failure of a tenant to appoint an appraiser, within the time stipulated, to fix the value of the premises as a basis of rental, was not wilful, and it did not appear that any new rights had intervened, or that the position of the parties had been changed by the delay in appointing appraisers, or that damage would result, while if relief was refused, the tenant would lose a valuable building, and time was not made of the essence of the contract, equity will excuse the delay and grant specific performance of the covenant to renew.<sup>9</sup>

<sup>7</sup> Washburn v. White, 197 Mass. 540, 84 N. E. 106.

<sup>8</sup> Magin v. Niner, 110 Md. 299, 73 Atl. 12, also holding that where the power of sale does not name the trustee to make the sale, and the executor is one of the parties to whom was granted the privilege of purchasing, at the appraised value, it would be inequitable to allow him to make the appraisal and then take the property at such value.

<sup>9</sup> Simon v. Schmitt, 118 N. Y. S. 326; Washburn v. White, 197 Mass. 540, 84 N. E. 106.

Option construed as requiring the optionee to take the property at the appraisal, and holding that the election to purchase should be at the price to be fixed by the arbitrators and that it could not elect and leave the price open until fixed so as to see whether it was satisfactory, *Montgomery Gaslight Co. v. City Council*, 87 Ala. 245,

**SEC. 1213. VALUATION CLAUSES.** — In a New Jersey case,<sup>1</sup> a lease gave the lessee an option to purchase the premises “at the expiration of the lease at a fair valuation by appraisement.” The

6 So. 113, 4 L. R. A. 616, distinguished in *Farmington Village Corp. v. Farmington W. Co.*, 93 Me. 192, 44 Atl. 609, holding under the language of the option that the optionee could elect after the appraisement; *Marino v. Williams*, 30 Nev. 360, 96 P. 1073, holding lessee had right to elect to renew after appraisal.

9 Duty of lessee where all arbitrators could not agree under agreement requiring concurrence of all, *Washburn v. White*, 197 Mass. 540, 84 N. E. 106, and holding mere lapse of time, by lessee, in obtaining an award is insufficient to show loss of his right to hold the property as purchaser, or the possession thereof, after electing.

*Sharkey v. Larkin*, 52 N. Y. 623, rental value to be determined by arbitration based on value of surrounding land.

Power of appointment where one valuer refuses to act, *Elberton Hardware Co. v. Hawes*, 122 Ga. 858, 50 S. E. 964.

Power to withdraw appointment, *Guild v. Atehison etc. R. Co.*, 57 Kan. 70, 45 P. 82, 57 A. S. R. 312, 33 L. R. A. 77.

The valuation or price fixed is conclusive in the absence of fraud, *Edmonds v. Millet*, 20 Beav. 54, 52 Eng. Reprint 522.

Revocation of arbitration, pleading, *Fitzsimmons v. Lindsay*, 205 Pa. 79, 54 Atl. 488.

Qualification of and objection to appraisers, *Chicago Aud. Ass'n v. Corp. Fine Arts Bldg.*, 244 Ill. 532, 91 N. E. 665, 18 Ann. Cas. 253; *City of Fayetteville v. Fayetteville Water L. & P. Co.*, 135 Fed. 400.

Agreement under which corporation sold stock with option to purchase, at an appraisal to be made by directors, construed as not requiring appraisal unless corporation desired to exercise option, *Whiton v. Batchelder & Lincoln Corp.*, 179 Mass. 169, 60 N. E. 483.

Provision in lease allowing lessee to have an appraisal of the property and an option to purchase for a certain period after the appraisal, is not specifically enforceable by the lessee because the lessor has no right to enforce specific performance, *Mutual Life Ins. Co. v. Stephens*, 214 N. Y. 488, 108 N. E. 856; see, also, Sec. 213.

1 *Lester Agricultural Chemical Works v. Selby*, 68 N. J. Eq. 271, 59 Atl. 247, further holding that the language of the clause “valuation by appraisement” did not show it was the intention of the parties that they should appoint their own appraisers, saying that appraisement by the court or its officers was as consistent with the words and spirit of the contract as any other and that it would interpretate the clause so as to give it effect rather than to defeat it.

lessee brought suit for specific performance, and it was urged by the lessor as a defense there was not sufficient certainty as to price to warrant a decree. The court answered by saying, the rule was that where the parties have agreed the land shall be conveyed, not upon a price to be agreed upon themselves, but at a fair price, or at a fair valuation, then the parties having fixed a standard or measure of value, without having designated any particular method of ascertaining the value or price, the court may, without making a contract, ascertain the price according to the standard fixed by the contract, and then enforce the contract, and added that the mode of ascertaining the value conflicts neither with the letter nor the spirit of the contract.

The same rule was laid down in an Illinois case.<sup>2</sup> The option to sell stipulated there should be a fair valuation of a portion of the land. It was held the valuation was to be fixed at a reasonable estimate made by the parties, if they could agree, or if they were unable to agree, then by the court, no means of ascertaining the value of the property being pointed out. In another case,<sup>3</sup> a lease provided the tenant should have an option extending the same for another term "unless the landlord shall pay a fair price for the building," to be erected by the

<sup>2</sup> *Estes v. Furlong*, 59 Ill. 298.

<sup>3</sup> *Duffy v. Kelly*, 55 N. J. Eq. 627, 37 Atl. 597, the court holding the contract contains the exception to the rule and quoting Sir William Grant, master of the rolls, in *Milnes v. Gery*, 14 Ves. 400: "The case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value were pointed out. There is nothing, therefore, precluding the court from adopting any means adapted to that purpose."

tenant. In a suit by the landlord for specific performance, after he had elected to purchase the building, it was held the court would fix the value of the property and enforce the contract.

SEC. 1214. MUTUALITY. MEANING OF.—As applied to contracts “mutuality” has different meanings. There is a mutuality of assent, meaning thereby it is essential to the validity of a contract that all the parties in their agreement intended the same thing.<sup>1</sup> There is a mutuality of engagement, or obligation, meaning thereby that, in a simple executory contract, each party must be bound to do something under it, or, as sometimes otherwise stated, an obligation on each party to do or permit to be done something in consideration of the act or promise of the other party.<sup>2</sup> There is a mutuality of remedy, meaning that in a court of equity one party to an executory contract can not have specific performance against the other party unless the former is bound in such way the latter can have specific enforcement of the contract against the former.<sup>3</sup>

Mutuality of assent is essential to the validity of every contract.<sup>4</sup> It is said mutuality of obligation

<sup>1</sup> *Cavagnaro v. Johnson*, 77 N. J. Eq. 272, 79 Atl. 686, affirming 70 Atl. 995, 74 N. J. Eq. 589; *German S. & L. Society v. McLellan*, 154 Cal. 710, 99 P. 194; *Phelan v. Neary*, 22 S. D. 265, 117 N. W. 142; *Creedy v. Grief*, 108 Va. 320, 61 S. E. 769.

<sup>2</sup> *Cal. Hirsch & Sons I. & R. Co. v. Paragould & M. R. Co.*, 48 Mo. App. 173, 127 S. W. 623.

<sup>3</sup> *Vassault v. Edwards*, 43 Cal. 458; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; *Heth v. Smith*, 175 Mich. 328, 141 N. W. 583.

<sup>4</sup> *Fetter on Equity*, p. 273; note 1, *supra*.

is not necessary in an action at law to recover damages,<sup>5</sup> but that it is necessary in a suit to specifically enforce a simple executory contract.<sup>6</sup>

SEC. 1215. MUTUALITY. APPLICATION OF RULE TO OPTION CONTRACTS.—The application to option contracts of the rules requiring mutuality of remedy and of obligation was insisted on by the courts in the early development of the law, and since an option contract, in virtue of its very nature and object, bound the optionor to sell, on election, but did not bind, absolutely, the optionee to elect and, therefore, to buy, it was held that, for this reason, its specific enforcement could not be had by the optionee at the hands of a court of equity. In these earlier and in some later decisions, the presence of a consideration for the option was not appreciated. The real obstacle to specific performance, as pointed out, was the rule requiring mutuality of obligation and of remedy to exist at the time of the execution of the option contract,<sup>1</sup> and since, as it was thought, no such mutuality then existed, the option, like an unaccepted offer, was a nude pact.<sup>2</sup>

<sup>5</sup> Fetter on Equity, p. 273; see *Dambmann v. Lorentz*, 70 Md. 380, 17 Atl. 389, 14 A. S. R. 364.

<sup>6</sup> Fetter on Equity, p. 273.

<sup>1</sup> *Duval v. Myers*, 2 Md. Ch. 401; *Hissam v. Parrish*, 41 W. Va. 686, 24 S. E. 600, 56 A. S. R. 892; *Wadick v. Mace*, 191 N. Y. 1, 83 N. E. 571, 20 L. R. A. (N. S.) 251.

<sup>2</sup> See *Smith v. Reynolds*, 8 Fed. 696, 3 McCrary 157; *Burnet v. Bisco*, 4 Johns. (N. Y.) 235; *Hissam v. Parrish*, 41 W. Va. 686, 24 S. E. 600, 56 A. S. R. 892.

But in an option and like contracts, it is not necessary that mutuality of obligation should have existed at the time the option was made,

Other and modern decisions have pointed out the distinction between the option contract and the bilateral contract, raised by an election to purchase. The former is not an agreement of sale and purchase of the property covered by the option; it is a sale, by the owner, of the right merely, at the election of the optionee, to buy the property; it does not, prior to election, bind him to any obligation whatsoever.<sup>3</sup>

In the early development of the law the effect of the election as transforming the option contract into a real bilateral contract was entirely overlooked or completely disregarded.

Later on the courts became concerned more with the legality of the transaction covered by the option, and having determined that the option contract, though one-sided in its nature, was not against public policy as being speculative, and reaching the conclusion that an owner of property had as good right to sell an option on his property

*Marie v. Garrison*, 83 N. Y. 14; *Naylor v. Parker*, (Tex. Civ. App.) 139 S. W. 93; *Davis v. Robert*, 89 Ala. 402, 8 So. 114, 18 A. S. R. 126; *Codding v. Wamsley*, 1 Hun. (N. Y.) 585, 4 N. Y. Sup. Ct. (4. Thomp. & C.) 49, affirmed 60 N. Y. 644.

3 "It is the right of election to purchase that has been bought and paid for and which forms the basis of the contract between the parties," *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403.

"The . . . option originally is neither a sale nor an agreement of sale. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his (optionor's) property at a fixed price, within a time certain. He does not sell the land; he does not then agree to sell it, but he does then sell something, viz: the right or privilege to buy at the election or option of the other party." *Id v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17.



as he had to sell the property itself,<sup>4</sup> and that an option contract, supported by a consideration, was not a nude pact, it only remained to discover that the contract which the court was called upon to enforce, and the contract, therefore, which must have mutuality, was the two-sided contract raised by the election and not the one-sided option.

The subject in hand is one of the most interesting connected with the law of options. Its presentation will show the evolution of the option contract from what some courts first thought was a nude pact, to an established and recognized form of contract, which is now used in many of the most important commercial transactions of the day.

After pointing out the distinction between mutuality of obligation and of remedy and then presenting some of the leading decisions showing the judicial evolution of the option from a nude pact to a real contract, attention will be turned to the bilateral contract raised by the election and to the modern rule that such contracts, in proper cases, may be, and quite uniformly are, specifically enforced by courts of equity.

## SEC. 1216. DISTINCTION BETWEEN MUTUALITY OF REMEDY AND OF OBLIGATION.

—The doctrine of mutuality of remedy is peculiar

<sup>4</sup> *DeRutte v. Muldrow*, 16 Cal. 505; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; see *Watkins v. Youll*, 70 Neb. 81, 96 N. W. 1042; *Johnston v. Wadsworth*, 24 Ore. 494, 34 P. 13.

The form of contract has become of general use and its legality recognized, *George etc. Co. v. Maxwell*, 78 Ohio St. 54, 84 N. E. 595, 597.

To deny the right to specific performance, upon election and in a case otherwise proper, is to deny the power of making conditional contracts, *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485.

to courts of equity. They will not grant specific performance of an executory contract, at the suit of one party, unless, at the same time, the party seeking such remedy may, in accordance with the rules of the court on the subject, be compelled specifically to perform on his part, at the suit of the other party. This rule has to do with the remedy merely and only. It has nothing to do with the respective obligations of the parties under the executory contract further than what is implied by the rule that in order to have mutual remedies each party must, by the terms of the contract, be bound to perform some act which a court of equity is capable of specifically enforcing at the suit of the other party. The rule, therefore, is founded on a common law contract containing stipulations by the respective parties for the performance of acts executory in their nature which a court of equity may and will specifically enforce.

The expression "mutuality of obligation" means an executory contract whose stipulations bind each party to the performance of some act which in law furnishes a consideration for the promise of the performance of some act by the other party. This rule is not the outgrowth, or the development, of equity jurisprudence. It is a common law rule pure and simple, but it is one which is observed and followed by a court of equity in the same way as it observes and follows the rule of law, for instance, requiring at least two parties to conclude a valid enforceable contract.

It will be noticed, therefore, that there is a fundamental distinction from the viewpoint of equity between mutuality of remedy and mutuality of

obligation. This distinction, however, has not always been observed in the decisions.

SEC. 1217. THE SAME, CONTINUED. THE OPTION CONTRACT.—To obtain a better conception of mutuality of obligation and its relation to the equitable rule of mutuality of remedy, take, for example, an unaccepted offer of a contract. By virtue of the offer there is no obligation on the part of the offeree to accept, nor on the part of the proposer to keep the offer open. There is no consideration, and no binding stipulation on either party. It is a nude pact; there is no mutuality of obligation.

Take a mere offer without consideration, which has been properly and timely accepted before its withdrawal by the proposer. In such case, agreement has been reached and a real contract concluded. The contract is not a nude pact because the effect of the acceptance is to bind the proposer to sell and the acceptor to buy and pay the price.<sup>1</sup> The executory contract thus concluded is mutual in obligation and even in the absence of an original consideration for the offer, there is mutuality of remedy for its enforcement by the respective parties.

Take an option contract supported by a consideration. In this form of transaction the parties have reached an agreement by the terms of which,

<sup>1</sup> *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522, holding acceptance of the offer, before revocation, constitutes a valid and mutually binding contract from which neither party can recede; also *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228.

for a consideration, the owner sells the option right on his property to the other party. A contract is thus concluded. This contract contains every essential necessary to make it a valid contract. It is supported by a consideration, and is, therefore, binding on the optionor to keep open his promise to sell, at the election of the optionee, for the time fixed, and it is binding on the optionee to pay the consideration for the option. It is not, therefore, a nude pact. If the optionor breaches the option during its time limit, the optionee, without election, would have a remedy at law for damages for the breach. And if the optionee fails to pay the consideration for the option, the optionor would have his remedy at law to recover the same. The option contract, therefore, even during its strict option life, has mutuality of obligation and it has also mutuality of remedy, but it should be observed, if such observation is necessary, that at law, mutuality of remedy is not necessary to the enforceability of a contract.<sup>2</sup> The decisions, therefore, holding that an option contract of the kind just described will not be specifically enforced in equity because lacking in mutuality, have failed to appreciate the distinctions pointed out.<sup>3</sup>

SEC. 1218. SAME, CONTINUED. THE BILATERAL CONTRACT. MUTUALITY OF OBLIGATION MEANS CONSIDERATION.—This brings the subject to the contract raised by the election of the optionee to purchase. In analogy

<sup>2</sup> Alabama etc. Ins. Co. v. Oliver, 82 Ala. 417, 2 So. 445.

<sup>3</sup> See Hissam v. Parrish, 41 W. Va. 686, 24 S. E. 600, 56 A. S. R. 892.

to offers, the effect of an election, timely and properly made, is to turn the option into a bilateral contract, and this is true whether or not the option was originally supported by a consideration.<sup>1</sup> The contract thus raised and now sought to be specifically enforced, is not the one-sided option contract, but the two-sided bilateral contract, in which there is mutuality of obligation.<sup>2</sup> Assuming an election which binds the optionee to purchase, the executory contract thus raised is not a nude pact and now, according to what we understand to be the established rule on the subject, the only concern of a court of equity is to ascertain and determine whether the remedies of the parties, under such executory contract, are mutual. And this inquiry is limited to the single question whether or not the act to be performed by the defendant, whether for the payment of the money consideration, or for the performance of some other act, is one which, in accordance with equitable principles, can and should be specifically enforced.<sup>3</sup>

Thus, take for instance a California case,<sup>4</sup> in which the consideration for the land to be conveyed was personal services. The court refused

<sup>1</sup> See note 1, Sec. 1217.

<sup>2</sup> See Sec. 1202.

<sup>3</sup> The fact that the relief sought by the optionor, or vendor, is to enforce the payment of money makes no difference. The test is whether there is a remedy to enforce the respective rights of the parties under the contract, and not whether the act to be performed is the payment of money, or the performance of some other act, see *Morgan v. Eaton*, 59 Fla. 562, 52 So. 305.

<sup>4</sup> *Cooper v. Pena*, 21 Cal. 404; see *Alworth v. Seymour*, 42 Minn. 526, 44 N. W. 1030; *King v. Gildersleeve*, 79 Cal. 504, 21 P. 961; *Kennicott v. Leavitt*, 37 Ill. App. 435; *Heth v. Smith*, 175 Mich. 328, 141 N. W. 583.

specific performance at the suit of the vendee because the remedy was not mutual. The court held it could not compel the vendee to perform the personal confidential services. The contract, however, was not for this reason a nude pact. The vendee had a remedy at law for damages, but, as illustrating the subject in hand, the vendee would not have been entitled to recover damages at law if the contract lacked mutuality of obligation.

The preceding discussion can be summarized by saying that mutuality of obligation means merely a contract that is not *nudum pactum*, or in other words, a contract supported by a consideration, or in some jurisdictions, a writing under seal.<sup>5</sup> And

<sup>4</sup> In an agreement for exchange of lands when the land to be exchanged by one of the parties is owned at the time by a third person, there is no mutuality of remedy if the land was not acquired at the time of the suit, *Norris v. Fox*, 45 Fed. 406.

<sup>5</sup> *Naylor v. Parker*, (Tex. Civ. App.) 139 S. W. 93.

The old rule that want of mutuality of obligation and remedy is a bar is now, by modern decisions, narrowed down to cases where there is no consideration to support the option, *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Murphy etc. Co. v. Reid*, 125 Ky. 585, 101 S. W. 964, 31 Ky. L. Rep. 176, 10 L. R. A. (N. S.) 195.

“The doctrine of the earlier English and American cases in which it was held that the want of mutuality of obligation and remedy would render the contract incapable of specific performance, has, by more modern cases, been so modified that optional agreements to convey without any corresponding obligation or covenant to purchase, will now be specifically enforced in equity, if made upon sufficient and valuable consideration,” or where the option is part of a lease or other contract which forms the true consideration for the option, *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; also *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723, 725; *Taber v. Dallas Co.*, 101 Tex. 241, 106 S. W. 332; *Litz v. Goosling*, 93 Ky. 185, 19 S. W. 527, 14 Ky. L. Rep. 91, 21 L. R. A. 127.

This always was the rule, and correctly so, when the option is contained in a lease which furnishes the consideration for the option, in which case it is held the consideration makes the “unilateral contract binding in equity,” which means that the miscalled mutuality of obligation is nothing more or less than the consideration for the

that with reference to an option contract, supported by a consideration, or under seal, or an offer without consideration, but timely and properly accepted, the only additional requirement in this respect, in a court of equity, for specific performance, is that there must be mutuality of remedy, and that the so-called, or mis-called, mutuality of obligation, in any other sense, may be dismissed as a play of legal phraseology and, of course, without point or meaning.<sup>6</sup>

Another distinction should be pointed out. Mutuality of obligation, or better the necessity for a consideration, going as it does to the legal existence of the executory contract, must necessarily arise concurrently with the making of the contract. But this is not true of mutuality of remedy. The original lack of mutuality of remedy under the contract, or better, in the right to specific performance of the contract, does not preclude the enforcement of the contract where such want has been removed at the time the suit is brought,<sup>7</sup> and in

option. See *Wolfe v. Lodge*, 159 Iowa 162, 140 N. W. 429, and cases cited, *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *McCormick v. Stephany*, 57 N. J. Eq. 257, 41 Atl. 840; *White v. Weaver*, 68 N. J. Eq. 644, 61 Atl. 25; *In re Hunter*, 1 Edw. Ch. (N. Y.) 1.

<sup>5</sup> And the same rule obtains with reference to an option to reconvey, *Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687.

<sup>6</sup> *Vassault v. Edwards*, 43 Cal. 458.

The correct rule is stated in *Heth v. Smith*, 175 Mich. 328, 141 N. W. 583, "To entitle a party to specific performance there must be a valid contract and at the time of the institution of the suit a mutuality of remedies and obligations."

<sup>7</sup> *Sayward v. Houghton*, 119 Cal. 545, 51 P. 853, 52 P. 44; citing *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; *Thurber v. Meves*, 119 Cal. 35, 50 P. 1063, 51 P. 536; *Vassault v. Edwards*, 43 Cal. 458; see, also, *Black v. Maddox*, 104 Ga. 157, 30 S. E.

some cases, like those of acquiring or perfecting title, at the time of making the decree.

SEC. 1219. MUTUALITY. OLD RULE. COOKE v. OXLEY.—The leading English case holding that an option contract is not enforceable, is *Cooke v. Oxley*, decided in 1790.<sup>1</sup> The facts as reported are these: A, having proposed to sell goods to B, gave him a certain time, at his request, to determine whether or not he would buy them. B, within the time, determined to buy them and gave notice thereof to A, and it was held that A was not liable, in an action on the case, for not delivering them because B was not bound by the original contract, there being no consideration to bind A. Lord Kenyon said nothing could be clearer than that, at the time of entering into the contract, the engagement was all on one side; that

723, 726; *Heth v. Smith*, 175 Mich. 328, 141 N. W. 583; see note 7, Sec. 1206.

<sup>7</sup> Mutuality of remedy required for specific performance need not exist prior to the filing of the bill and is a consequence of it, *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500. See *Kentucky D. & W. Co. v. Blanton*, 149 Fed. 31, 80 C. C. A. 343, when optionor made a contract for sale of property and afterwards placed himself in a position where specific performance could be decreed against him.

<sup>1</sup> *Cooke v. Oxley*, 3 T. R. 653, 100 Eng. Reprint 785. This decision has been the subject of much criticism both in this country and in England. See note 2, *infra*, and also *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346, which says the *Cooke* decision affirms only that the offeror is not bound to wait till the expiration of time limit before withdrawing; *Humphries v. Carvalho*, 16 East 45, saying the complaint in the *Cooke* case failed to allege an election.

As further bearing on the *Cooke* decision, see *Bromley v. Jeffereys*, Prec. Ch. 138, 2 Vern. 415, 24 Eng. Reprint 66; see, also, *Lawrenson v. Butler*, 1 Sch. & Lef. 13; and *Gillespie v. Edmonston*, 11 Humph. (Tenn.) 553.



the other party was not bound and that, therefore, the engagement was *nudum pactum*.

It is said, in a Massachusetts case,<sup>2</sup> that *Cooke v. Oxley* was overruled by *Adams v. Lindsell*, 1 B. & Ald. 618, and is now no longer regarded as authority, and further, that the report of the case is inaccurate in that, in fact, there was no acceptance. The Massachusetts case then lays down the rule that a proposition to sell land at a certain price, if taken within a certain time, is a continuing offer which may be retracted at any time before acceptance; but if accepted within the time, and before retraction, it may not be retracted, as such offer and acceptance constitute a valid contract, the specific performance of which will be enforced by bill in equity.

<sup>2</sup> *Boston etc. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224. The court points out that a different doctrine obtains in France, Scotland, and Holland, saying it is there held that whenever an offer is made, granting to a party a certain time within which he is entitled to decide whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the appointed time; but whether wisely or not, the common law insists upon a consideration, or a sealed writing, in order to obligate the optionor not to withdraw his offer during the stipulated time.

Following the Massachusetts decision in repudiating *Cooke v. Oxley*, see *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723, and *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 A. S. R. 341, saying the doctrine of the *Cooke* case has been abated to the extent that if the offer, without consideration, is accepted before withdrawal, such offer and acceptance constitute a valid contract; also *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17.

Commenting on *Cooke v. Oxley*, Sir William Anson (*Anson on Contracts*, 2nd Am. Ed., top page 34) says the case turned on the pleadings; that is, the declaration did not disclose a good cause of action by alleging a contract, and remarks that the court not only regarded *Oxley* as free to revoke his offer at any time before acceptance, but free to revoke it by a mere sale of the goods without notice (there being no consideration). As to notice of revocation, see Sec. 704.

SEC. 1220. MUTUALITY. OLD RULE.—*Bean v. Burbank*<sup>1</sup> follows the *Cooke* decision and holds that a contract in writing, conveying lands at a fixed price, and within a stated time, on payment of a certain sum, where nothing was paid, or agreed to be paid, by the other party to obtain the contract, is void, for want of consideration. The court ruled out an offer on the part of the optionee to prove acceptance and tender within the time fixed. The offer, so far as the report of the case shows, was not withdrawn prior to the alleged acceptance.

SEC. 1221. MUTUALITY. OLD RULE MODIFIED. *BOUCHER v. VAN BUSKIRK, AND OTHER KENTUCKY CASES*.<sup>1</sup>—This case was made to turn on the point that the option contract in the lease of the premises lacked mutuality, and would not, therefore, be specifically enforced. The lessee went into possession of the premises, made valuable improvements, and in time tendered the option price and demanded a deed. The court said

<sup>1</sup> *Bean v. Burbank*, 16 Me. 458, 33 Am. Dec. 681. This case seems to hold, like some of its predecessors, that an option contract without consideration in *nudum pactum*, though accepted in time and before withdrawal.

In *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17, it is said the decision in *Boston etc. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224, distinguishes *Bean v. Burbank*, which seems to hold contrary to the modern and established rule.

<sup>1</sup> *Boucher v. Van Buskirk*, 9 Ky. (2 A. K. Marsh) 345. Followed in *Jones v. Noble*, 66 Ky. (3 Bush.) 695. In the latter case, however, tender of the price and election were not in time. See, also, *Butt v. Bondurant*, 23 Ky. 421. As to *Berry v. Frisbie*, see Sec. 1236, note 5.

It is said in *Murphy etc. v. Reid*, *infra*, that the case of *Bank of Louisville v. Baumiester*, 87 Ky. 6, 7 S. W. 170, 9 Ky. L. Rep. 845, repudiated the principal of the *Boucher* decision.

that if both parties could not have demanded execution of the contract, neither should be favored. This decision was followed in *Litz v. Goosling*<sup>2</sup> involving a contract for the sale of land which by reason of a termination clause was construed to be an option and where it was held such contract could not be specifically enforced by the vendee for want of mutuality. It does not appear whether there was an election but this seems to be negligible, as the decision is made to turn on the point that the option contract, lacking mutuality of obligation, was *nudum pactum*. A later case<sup>3</sup> distinguishes both of the above and other decisions on the ground of lack of consideration to support the option, and holds that an option to purchase contained in a lease of land could be enforced since the lease furnished the consideration for the option. In a still later case,<sup>4</sup> the modern and established rule was laid down that an option based on a valuable and sufficient consideration could, in a case otherwise proper, be specifically enforced, and further, that even if the option was without consideration, still if an election was made before the

<sup>2</sup> *Litz v. Goosling*, 93 Ky. 185, 19 S. W. 527, 14 Ky. L. Rep. 91, 21 L. R. A. 127.

<sup>3</sup> *Bacon v. Kentucky C. R. Co.*, 95 Ky. 373, 25 S. W. 747, 16 Ky. L. Rep. 77, the court says modern authorities have narrowed the doctrine of mutuality down to cases in which there is no other consideration and that it is now well settled that an option contract to convey or renew a lease without any covenant or obligation to purchase or accept, and without any mutuality of remedy (obligation) will be enforced in equity if made upon proper consideration.

<sup>4</sup> *Murphy etc. Co. v. Reid*, 125 Ky. 585, 101 S. W. 964, 31 Ky. L. Rep. 176, 10 L. R. A. (N. S.) 195, in this case the court said of the *Litz* case, *supra*, that it did not appear the court considered the effect of the acceptance of the option during its time and before its withdrawal by the owners of the land.

option was withdrawn, a binding contract was raised which a court of equity would specifically enforce.

SEC. 1222. MUTUALITY. *BENEDICT v. LYNCH* AND OTHER NEW YORK CASES.<sup>1</sup>

—This case involved an option to purchase, contained in a lease of land. Chancellor Kent in passing said it had been ruled in several cases<sup>2</sup> that a bill for specific performance could not be sustained if the remedy was not mutual, or if one party only was bound by the agreement, but that there were other cases in which the agreement had not been deemed within the Statute of Frauds and specific performance had been decreed, when the contract was signed only by the party to be charged,<sup>3</sup> and that the contrary opinion, from the then most recent decisions, appeared to be then prevailing.<sup>4</sup>

In a later case,<sup>5</sup> however, he remarked that from a review of the cases then made by him, it was too

1 *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 370, 7 Am. Dec. 484.

2 Citing *Armiger v. Clark*, Bunb. 111; *Bromley v. Jeffereys*, Pree. Ch. 138, 2 Vern. 415; 24 Eng. Reprint 66; *Lawrenson v. Butler*, 1 Sch. & Lef. 13.

3 Citing *Seton v. Slade*, 7 Ves. 265; *Fowle v. Freeman*, 9 Ves. 351.

4 Citing *Champion v. Plummer*, 5 Esp. N. P. 240; *Huddleston v. Briscoe*, 11 Ves. 592.

5 *Clason's Ex'rs v. Bailey*, 14 Johns. 484.

In the *Matter of Hunter*, 1 Edw. Ch. (N. Y.) 1, it is said that the case of *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 282, and *Benedict v. Lynch*, *supra*, were referred to as establishing the doctrine that lack of mutuality was a bar to specific performance and referring to the *Clason* case, *supra*, holds that an option will be specifically enforced in a proper case; see, also, *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576; *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Burnet v. Bisco*, 4 Johns. 235; *Jones v. Barnes*, 94 N. Y. S. 695, 105 App. Div. 287.

well established to be questioned that a contract, though not mutual, would, in a proper case, be specifically enforced.

It is pointed out in another case,<sup>6</sup> that the rule does not apply to a contract for the sale of land in which it is expressly stipulated that no action, whether for specific performance or damages, should be brought by the vendor against the purchaser, where no such restriction was imposed upon the purchaser, and holding that such a contract must be mutual in its obligation and in its remedy. The court held this stipulation made the contract unilateral and the effect of the ruling on the facts was to deny the right of the optionee to have specific performance, unless the case can be distinguished, as undoubtedly it should be, and as appears from the decisions it was, distinguished on the ground that the stipulation referred to was inserted with knowledge of the rule requiring mutuality of remedy as a basis for a suit of specific performance of the contract, and that, therefore, the vendor in relinquishing the right to this remedy herself, assumed that her action in so doing necessarily involved relinquishment by the vendee; or further, unless the case is distinguished as it and all other like cases can be distinguished, as a contract signed by both parties. In an option contract, the effect of filing a bill for its specific enforcement, after proper and timely election, binds the optionee, and this gives mutuality, meeting all the requirements of the rule. In a contract originally

<sup>6</sup> *Wadick v. Mace*, 191 N. Y. 1, 83 N. E. 571, 2 L. R. A. (N. S.) 251, the court also holding in effect that the contract was too vague and indefinite as to boundaries to be specifically enforceable.

signed by both parties and containing a stipulation like the one involved in the Wadick case, which has the effect of relinquishing or destroying mutuality, the filing of a bill can not give mutuality because the effect of the stipulation is to bar any remedy at all on the contract.<sup>7</sup>

In *Levin v. Deitz*,<sup>8</sup> the owner of premises, after he and plaintiff had discussed a sale thereof with the owner's broker, who was authorized by him to sell the premises, wrote and signed a letter addressed to plaintiffs in which he stated he would mail deeds of the property to certain brokers, and requiring plaintiffs to be present at a specified time and place, with the sum in cash, and receive a deed to the property. The owner also wrote his broker to the same effect. There was no express agreement on the part of plaintiffs to buy. Suit was brought for specific performance, and it was found by the trial court that plaintiffs were present at the time and place and on the day mentioned, and produced and tendered the price, and demanded a deed of the premises, and that the owner, defendant, was not then and there present, and that no deed to the premises was offered to plaintiffs. Judgment went for plaintiffs for specific performance. This was

<sup>7</sup> *Palmer v. Gould*, 144 N. Y. 671, 39 N. E. 378, 381.

But the fact that the option gave the optionee a choice of election to sue for damages or for specific performance, while it gave the optionor stipulated damages, does not preclude the optionee having specific performance, *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586, 12 Ann. Cas. 88.

<sup>8</sup> *Levin v. Dietz*, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. (N. S.) 251. In *Mutual Life Ins. Co. v. Stephens*, 214 N. Y. 488, 108 N. E. 856, it is held that mutuality of remedy need not exist at the inception of the contract; lease for appraisal of the property and option to purchase.

affirmed by the Appellate Division and reversed by the Court of Appeals, the court saying: "Whatever conflict and uncertainty may have been created by earlier decisions, in comparatively recent years a series of cases has come to this court, finally leading up to that of *Wadick v. Mace* (cited *supra*), whereby it has been finally and firmly established that specific performance of a unilateral contract will not be adjudged against the party who has executed it on behalf of the opposite party, who is not in any manner bound by the contract."

The above is undoubtedly a correct statement of the rule as applied to a unilateral contract, that is, an offer lacking acceptance, or an option lacking election. The court having reached the conclusion that plaintiff's presence at the appointed time and place and his tender and demand for a deed were not an acceptance, it necessarily followed that no binding contract was raised and that, consequently, there was lack of mutuality and that, in such case, the mere filing of a bill for specific performance would not bind the purchaser or give mutuality to the contract.

**SEC. 1223. MUTUALITY. OLD RULE MODIFIED. GRAYBILL V. BRAUGH<sup>1</sup> AND OTHER VIRGINIA CASES.**—This case involved a writ-

<sup>1</sup> *Graybill v. Braugh*, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 A. S. R. 894, it also appearing that the wife of the optionor did not sign the option contract and refused to join in the deed so as to release her dower interest, the court holding that in such case it would not decree specific performance unless plaintiff was willing to pay the full price and accept the husband's deed alone.

To the same effect as the *Graybill* case, see *Wood v. Dickey*, 90 Va. 160, 17 S. E. 818.

ten option for the purchase of land, without consideration, and expressly provided that there should be no obligation on the optionee to purchase "unless within the period of said ten months (the option time) he pays one-third of the purchase money."

It was held plaintiff was not entitled to specific performance, but it is not clear whether the decision was placed on the ground of lack of consideration, or lack of mutuality, or on the erroneous notion that an option is "not such an interest in the subject (land) of which a purchaser for value was bound to notice, or which equity will regard," the optioned property having been purchased by a third party during the life of the option time with notice of plaintiff's outstanding option. The court remarked, however, that plaintiff's "bill should have been dismissed in the Circuit Court for want of mutuality of obligation in the option sued on. It professes to bind one of the parties absolutely and stipulates only for the indefinite pleasure of the other; and it can not, therefore, be specifically enforced."

In a subsequent case from the same court,<sup>2</sup> it is said the ruling in the Graybill case, *supra*, to the effect that an option contract would not be enforced in equity because one-sided and lacking mutuality, was practically overruled in *Central Land Company v. Johnson*<sup>3</sup> and *Cummins v. Beavers*,<sup>4</sup> and

<sup>2</sup> *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 115 A. S. R. 880, 5 L. R. A. (N. S.) 1194.

<sup>3</sup> *Central Land Co. v. Johnson*, 95 Va. 223, 28 S. E. 175.

<sup>4</sup> *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881, 1 Ann. Cas. 986.



the rule is there laid down that if the option is supported by a valuable consideration, or is evidenced by a writing under seal, and is accepted within the specified time, equity, in a case otherwise proper, will grant specific performance at the suit of the optionee.

SEC. 1224. MUTUALITY. OPTIONS AND OFFERS. MODERN AND ESTABLISHED RULE. GENERALLY.—The cases reviewed in the preceding sections, touching mutuality, show a tendency, in the early development of the law, to denounce option contracts upon various grounds and it is for this reason these cases have been presented at some length. It is proposed to collect the numerous decisions of courts of the various states, holding that an option contract supported by a consideration, or in some jurisdictions, evidenced by a sealed writing, or contained in a lease or other contract furnishing a consideration to support the option therein, is not a nude pact, notwithstanding that, prior to election thereunder, it does not bind the optionee to purchase and notwithstanding some decisions holding to the contrary. It will appear from a perusal of the decisions to be cited that, at the present day, the option contract is not unfavorably looked upon as formerly it was by the courts of some jurisdictions, and that where the optionee, under the option contract, properly and seasonably elects, the case being otherwise proper, specific performance will be granted of the contract thus raised by the election. And, further, that the same rules obtain with reference to offers, or options not under seal, or not

supported by a consideration, where the offer or option is properly and seasonably accepted before its withdrawal by the proposer or optionor.<sup>1</sup>

SEC. 1225. MUTUALITY. MODERN AND ESTABLISHED RULE. ALABAMA. ARKANSAS.—In *Moses v. McClain*,<sup>1</sup> the optionee sought specific performance of the following option: “For and in consideration of the sum of \$1 in hand paid, I hereby give A. J. Moses an option on my lands and improvements, situated near Sheffield and known as my ‘Home Place,’ containing 125 acres more or less, for the sum of \$8000, to be paid, say \$3000 cash and balance in one or two years, with

<sup>1</sup> *Boston etc. R. Co. v. Bartlett*, 3 Cush. (Mass.) 224; *Walter G. Reese Co. v. House*, 162 Cal. 740, 124 P. 442; *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228; *McCowen v. Pew*, 18 Cal. App. 302, 123 P. 191; *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *Western Sec. Co. v. Atlee*, (Iowa) 151 N. W. 56; *Carter v. Love*, 206 Ill. 310, 69 N. E. 85; see *Donahue v. Potter & George Co.*, 63 Neb. 128, 88 N. W. 171; *Goodman v. Spurlin*, 131 Ga. 588, 62 S. E. 1029; *Abel v. Gill*, 95 Neb. 279, 145 N. W. 637; *Tidball v. Challburg*, 67 Neb. 524, 93 N. W. 679; *Schroeder v. Gemeinder*, 10 Nev. 355; *Murphy T. & Co. v. Reid*, 125 Ky. 585, 101 S. W. 964, 31 Ky. L. Rep. 176, 10 L. R. A. (N. S.) 195.

But of course if not timely accepted it lacks mutuality and will not be specifically enforced at the suit of either party, *Sprague v. Schotte*, 48 Ore. 609, 87 P. 1046; see *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Litz v. Goosling*, 93 Ky. 185, 19 S. W. 527, 14 Ky. L. Rep. 91, 21 L. R. A. 127; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755.

<sup>1</sup> *Moses v. McClain*, 82 Ala. 370, 2 So. 741; citing *Wilks v. Georgia Pac. R. Co.*, 79 Ala. 180.

The *Moses* case was followed and approved in *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 11 L. R. A. 148, 30 A. S. R. 47, and in principle in *Taylor v. Newton*, 152 Ala. 459, 44 So. 583; see also *Linn v. McLean*, 80 Ala. 360.

The same rule obtains in Arkansas, *Meyer v. Jenkins*, 80 Ark. 209, 96 S. W. 991.

interest from date of possession, money to be paid when titles are approved. This option good for two days. (Signed) J. W. McClain." It appeared the optionor was a married man and was residing on the optioned property with his wife as a homestead. The optionee timely elected to purchase. The optionor refused to convey on the ground that his wife would not consent to join in the execution of a deed of conveyance. The optionee then gave notice of his willingness to accept the deed of the optionor alone, but the optionor still refused to convey and the optionee brought suit for specific performance. The defense was want of mutuality in that the optionee had not bound himself by writing to purchase. The court said mutuality was one of the conditions of a rightful suit for specific performance, but that the decisions did not go to the length contended for; that where the contract is fair, just, and reasonable in all its parts, and the party sought to be charged has so bound himself as to meet the requirements of the Statute of Frauds, the election of the optionee to treat the contract as binding upon him and to enforce it met the requirements of the rule.

SEC. 1226. MUTUALITY. MODERN AND ESTABLISHED RULE. CALIFORNIA. COLORADO.—Hall v. Center,<sup>1</sup> involved an option con-

<sup>1</sup> Hall v. Center, 40 Cal. 63; see Vassault v. Edwards, 43 Cal. 458, Statute of Frauds, citing Cooper v. Pena, 21 Cal. 404; also DeRutte v. Muldrow, 16 Cal. 505, (Lease and Option); Calanchini v. Branstetter, 84 Cal. 249, 24 P. 149; Sayward v. Houghton, 119 Cal. 545, 51 P. 853, 52 P. 44, (stock); Smith v. Bangham, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; Walter G. Reese Co. v. House, 162 Cal. 740, 124 P. 442.

tract executed by the predecessors of plaintiff and defendant respectively, by the terms of which they agreed to establish the boundary line between their lands, by a survey, and give to each of the parties the privilege of purchasing the land of the other lying on his side of the true line to be established by the survey. The survey was made and the line established and plaintiff elected to purchase the land of the defendant lying as aforesaid and tendered him the value of the land. Defendant refused to convey and plaintiff brought suit for specific performance. One of the defenses was that the contract was not mutual and, therefore, could not be enforced. The court said the rule undoubtedly was that a contract to be specifically enforced must be mutual, but that there were exceptions and one of them was that a contract for the sale of real estate, at the option of the vendee only, upon election and notice, may not only be enforced, but the refusal of the vendor to accept the purchase money did not destroy the mutuality, though the vendee could thereupon withdraw his election.

SEC. 1227. MUTUALITY. MODERN AND ESTABLISHED RULE. GEORGIA. ILLINOIS.—In *Sims v. Lide*,<sup>1</sup> the defendant, in consideration of \$5 agreed to make plaintiff a good and sufficient title to certain land, upon condition that

<sup>1</sup> *Gordon v. Darnell*, 5 Colo. 302, holding, however, that if there is no consideration to support the option, it is, until timely and properly elected, a nude pact.

<sup>1</sup> *Sims v. Lide*, 94 Ga. 553, 21 S. E. 220; see, also, *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541; *Goodman v. Spurlin*, 131 Ga. 588, 62 S. E. 1029; *Perry v. Paschall*, 103 Ga. 134, 29 S. E. 703.

plaintiff paid him a certain sum within a fixed time. The price was duly and timely tendered, but defendant refused to convey and plaintiff brought suit for specific performance. The question arose on demurrer to the bill, alleging lack of mutuality and want of consideration. The court held to the general and established rule that a contract under seal by A to convey land to B, provided such payment was made within a certain time, was, if supported by a consideration of \$5, actually paid at the time, obligatory on A, upon the election of B to purchase and tender of the price for the property, and in such case there was no want of mutuality; that both parties were bound absolutely and specific performance would be enforced at the instance of B.

The same rule is observed and followed in Illinois. In *Hayes v. O'Brien*,<sup>2</sup> involving an option to purchase, contained in a lease, it is said the doctrine of the early English and American cases, in which it was held that want of mutuality of obligation and remedy would render the contract incapable of specific enforcement, has, by more modern cases, been so modified that optional agreements to convey, without any corresponding obligation or covenant to purchase, will now be specifically enforced in equity if made upon sufficient and valuable consideration.

<sup>2</sup> *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; see, also, *Perkins v. Hadsell*, 50 Ill. 216; *Estes v. Furlong*, 59 Ill. 298; *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580; *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645; *Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874; *Seyferth v. Groves etc. R. R. Co.*, 217 Ill. 483, 75 N. E. 522.

33—Option Contracts.

SEC. 1228. MUTUALITY. MODERN AND ESTABLISHED RULE. INDIANA. IOWA. KANSAS. LOUISIANA. MARYLAND.—*Souffrain v. McDonald*.<sup>1</sup> A leased a certain tract of land to B and C for a term of years and gave them therein an option to purchase the leased lands for a certain consideration. They elected and otherwise performed their part of the lease and the option agreement, and demanded a deed of conveyance. The defendant refusing, plaintiff brought suit for specific performance, and it was held that upon election and tender there arose a binding contract to convey which a court of equity would enforce. The court saying, it was well settled that an option contract to convey, or to renew a lease, without any covenant or obligation to purchase, or accept, and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of the lease or other contract between the parties, that may be treated as a consideration for it.

The same rule obtains in Iowa,<sup>2</sup> Kansas,<sup>3</sup> Louisiana,<sup>4</sup> and Maryland.<sup>5</sup>

<sup>1</sup> *Souffrain v. McDonald*, 27 Ind. 269; see, also, *Herman v. Babcock*, 103 Ind. 461, 3 N. E. 142; *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535; *Fowler Utilities Co. v. Gray*, 168 Ind. 1, 79 N. E. 987, (injunction).

<sup>2</sup> *Goodpaster v. Porter*, 11 Iowa 161; *Western Sec. Co. v. Atlee*, (Iowa) 151 N. W. 56.

<sup>3</sup> *Chadsey v. Condley*, 62 Kan. 853, 62 P. 663; *Quinton v. Mulvane*, 71 Kan. 687, 81 P. 486.

<sup>4</sup> *Whitting, Succession of*, 121 La. 501, 46 So. 606, 15 Ann. Cas. 379.

<sup>5</sup> *Stansbury v. Fringer*, 11 Gill. & J. (Md.) 149; *Maughlin v. Perry*, 35 Md. 352; *Thomas v. Gottlieb etc. Brewing Co.*, 102 Md. 417, 62 Atl. 633; *Dambmann v. Lorentz*, 70 Md. 380, 17 Atl. 389, 14 A. S. R. 364, (action for damages for non-delivery of goods).

SEC. 1229. MUTUALITY. MODERN AND ESTABLISHED RULE. MASSACHUSETTS. —In *O'Brien v. Boland*,<sup>1</sup> the written offer to sell was under seal. There was no consideration other than that imported by the seal. The offer was conditioned upon acceptance within ten days. Two days after making the offer, the defendant (vendor), in writing, withdrew it. Plaintiff (purchaser), notwithstanding the withdrawal, accepted the offer, which acceptance was, of course, within the stipulated time. Defendant refused to convey and plaintiff brought suit for specific performance. The defendant contended that because he could not have compelled plaintiff to buy before the acceptance, there was want of mutuality, which should defeat the bill. Answering this contention, the Supreme Court said it specifically enforced contracts assented to by both parties and further acted upon by plaintiff, even when he had given only a verbal assent, and, but for the offer in his bill, could not be held to performance on his part, the court holding that because the offer was under seal, it was an irrevocable covenant, conditional upon acceptance within ten days, and that the written acceptance within that time made it a mutual contract, which plaintiff could have specifically enforced.

<sup>1</sup> *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602. The court said it was not necessary to discuss whether it would specifically enforce a contract upon which the plaintiff had not acted, except to give a mere assent which would not enable the defendant to enforce the contract against plaintiff. See, also, *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; *Boston etc. Ry. Co. v. Rose*, 194 Mass. 142, 80 N. E. 498; *Boston etc. Ry. Co. v. Bartlett*, 3 Cush. (Mass.) 224.

SEC. 1230. MUTUALITY. MODERN AND ESTABLISHED RULE. MICHIGAN. MINNESOTA. MISSOURI. MONTANA. NEBRASKA. NEVADA. NORTH DAKOTA. NEW MEXICO.

—The option to purchase land, in *Solomon Mier Co. v. Hadden*,<sup>1</sup> recited a consideration of \$1 and its receipt by the optionor, and provided that if the optionor failed or refused to convey, the optionee could specifically enforce the contract, or, at his option, recover damages against the optionor, with interest and attorney's fees, and further provided, that the optionee could refuse to purchase the land, and if he did so, he should forfeit and pay to the optionor, with interest and attorney's fees, the sum of \$1, which should constitute the only liability on his part. Plaintiff duly and timely elected and defendant refused to convey. Referring to the alleged want of mutuality in the contract, the court said that an option for the purchase of land based on a valuable consideration is valid, and will be specifically enforced, and that there was no want of mutuality in the right of specific enforcement because the optionee, by the express terms of the contract, was given the right to maintain a suit for specific performance or an action for damages.

The courts in Minnesota,<sup>2</sup> Missouri,<sup>3</sup> Montana,<sup>4</sup>

<sup>1</sup> *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586, 12 Ann. Cas. 88; see, also, *Gustin v. Union School Dist.*, 94 Mich. 502, 54 N. W. 156, 34 A. S. R. 361; *Agar v. Streeter*, 183 Mich. 600, 150 N. W. 160; *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555.

<sup>2</sup> *First Nat'l Bank v. Corp. Sec. Co.*, 128 Minn. 341, 150 N. W. 1084.

<sup>3</sup> *Warren v. Costello*, 109 Mo. 338, 19 S. W. 29, 32 A. S. R. 669; *Mers v. Franklin Ins. Co.*, 68 Mo. 127.

<sup>4</sup> *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17.



Nebraska,<sup>5</sup> Nevada,<sup>6</sup> North Dakota,<sup>7</sup> and New Mexico<sup>8</sup> all hold to the general rule exhibited by the preceding and following decisions to the effect that an option to purchase land supported by a valuable consideration, duly and timely elected, will be specifically enforced at the suit of the optionee as against the objection of want of mutuality.

SEC. 1231. MUTUALITY. MODERN AND ESTABLISHED RULE. NEW JERSEY.—The early case of *Hawralty v. Warren*<sup>1</sup> laid down the rule that a one-sided or unilateral contract binding one party to convey lands and not binding the other party to purchase is not favored in equity and will not be specifically enforced, if without consideration, but if the contract is part of a lease, or is one made at the same time with it and in consideration of the lease, it will be specifically enforced, and, after reviewing and commenting upon numerous decisions of the courts, said the old rule that want of mutuality of obligation and remedy is a bar to specific performance had, by modern authorities, narrowed the doctrine down to contracts in which there is no consideration to support the option

<sup>5</sup> *Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255; *Donahue v. Potter & George Co.*, 63 Neb. 128, 88 N. W. 171; *Tidball v. Challengburg*, 67 Neb. 524, 93 N. W. 679; *Abel v. Gill*, 95 Neb. 279, 145 N. W. 637.

<sup>6</sup> *Schroeder v. Gemeinder*, 10 Nev. 355.

<sup>7</sup> *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637.

<sup>8</sup> *Borel v. Mead*, 3 N. M. 84, 2 P. 222.

<sup>1</sup> *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Page v. Martin*, 46 N. J. Eq. 585, 20 Atl. 46; *Waters v. Bew*, 52 N. J. Eq. 787, 29 Atl. 590.

privilege. Following this decision is *Houghwout v. Boisaubin*,<sup>2</sup> holding that an offer, or proposal, by one party to another, unsupported by a consideration, is a nude pact, but if timely and properly accepted will, notwithstanding lack of consideration, be specifically enforced. In a later case,<sup>3</sup> it was held that the general rule that equity will not specifically enforce the performance of a contract, where, from its terms, a right does not arise in favor of each party against the other, and where either party is not entitled to the equitable remedy of specific execution of such obligation against the other contracting party, had been so modified that if the quality originally lacking be subsequently supplied, the enforcement of the contract may be made possible.

SEC. 1232. MUTUALITY. MODERN AND ESTABLISHED RULE. NORTH CAROLINA. OHIO. OREGON.—In *Bryant Timber Co. v. Wilson*,<sup>1</sup> speaking of an option to purchase growing timber, the court said that if the defendants had

<sup>2</sup> *Houghwout v. Boisaubin*, 18 N. J. Eq. 315; *Richards v. Green*, 23 N. J. Eq. 536; see, also, *Cutting v. Dana*, 25 N. J. Eq. 265; *Reynolds v. O'Neil*, 26 N. J. Eq. 223.

*Miller v. Cameron*, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554, suit by optionor against optionee who signed agreement, the optionor not signing.

<sup>3</sup> *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380, the point made was that the covenant gave plaintiff the right (option) to repurchase the property but did not provide that he must do so. See *Cohen v. Pool*, (N. J.) 94 Atl. 37.

<sup>1</sup> *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 932; also *Alston v. Connell*, 140 N. C. 485, 53 S. E. 292; *Trogden v. Williams*, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867; *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171.

withdrawn the option or offer to sell before its unconditional acceptance, there being no valuable consideration for it, they would have exercised an unquestioned right, for without a valuable consideration to support it, the agreement would be a mere *nudum pactum*, and might have been withdrawn at any time; that until the proposal is accepted, there can be no contract, as there is nothing by which the proposer can be bound, and unless both are bound so that an action can be maintained against the other party for the breach, neither will be bound; but after an unconditional acceptance, there is a valuable consideration to support the contract; it then becomes mutual and the voluntary proposal of one becomes the binding obligation of both; that contracts of this character in respect to land, when unconditionally accepted, have been very generally enforced by courts of equity and specific performance decreed.

In Ohio<sup>2</sup> it is held that the option contract has become of general use in the business world, and if there ever was any ground for denying the legal validity of such contracts, they have been too often recognized as valid to justify serious doubt now; that such a contract is not necessarily void for lack of mutuality, and where accepted within the time specified, may become a valid and enforceable contract.

In Oregon<sup>3</sup> it is said the decided cases show that the rule as to mutuality is clearly circumscribed by numerous limitations, and that a conditional or

<sup>2</sup> *George etc. Brewing Co. v. Maxwell*, 78 Ohio St. 54, 84 N. E. 595.

<sup>3</sup> *Johnston v. Wadsworth*, 24 Ore. 494, 34 P. 13, option to sell. See *House v. Jackson*, 24 Ore. 89, 32 P. 1027, lease and option.

unilateral contract may fall within these exceptions; that the principle is well settled that when the owner of land gives another, for a sufficient consideration, an option or privilege to purchase land, within a given time, in writing, with full knowledge of the fact that he is bound and the other party is not, it is such a contract as will be enforced in equity at the instance of the party holding the option.

SEC. 1233. MUTUALITY. MODERN AND ESTABLISHED RULE. PENNSYLVANIA. RHODE ISLAND. SOUTH CAROLINA. TENNESSEE.—The validity of an option contract was early recognized in Pennsylvania, the court holding that in a case otherwise proper, the specific performance of an option contract for the purchase of land would be granted, saying that to assert that, upon election or acceptance, the optionor is not bound, is to deny the power of making conditional contracts, since the election or acceptance is not the initiation of a new contract, but the exercise of a right under a stipulation on which an old contract rests, and that, therefore, the mutuality arising upon election is not destroyed by the refusal of the optionor to convey.<sup>1</sup>

The decisions of Rhode Island,<sup>2</sup> South Carolina,<sup>3</sup> and Tennessee<sup>4</sup> are in accord with the general rule

<sup>1</sup> *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485. See *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Smith's Appeal*, 69 Pa. 474.

<sup>2</sup> *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500.

<sup>3</sup> *McSwain v. Davis*, 96 S. C. 165, 80 S. E. 87.

<sup>4</sup> *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195; *Cherry v. Smith*, 22 Tenn. 19, 39 Am. Dec. 150.

that upon timely and proper election to purchase, the option is changed into a contract of sale binding upon the optionor to convey, and gives the optionee such right as will enable him to maintain a suit for specific performance.

SEC. 1234. MUTUALITY. MODERN AND ESTABLISHED RULE. VIRGINIA. WEST VIRGINIA. WASHINGTON. WISCONSIN. WYOMING. FEDERAL DECISIONS.—In *Rease v. Kittle*,<sup>1</sup> it is said that the peculiarity of an option contract which makes it anomalous and sometimes difficult to construe, is the want of mutuality of remedy; that the distinction, however, between want of mutuality of remedy and lack of mutuality in the contract must not be overlooked; that in the option the privilege of purchasing is bought and paid for; that the option contract, but not the contract of purchase of the land, is fully performed by the optionee, that is, executed on the side of the optionee, and needs no remedy for its enforcement, but is executory and unperformed on the other side and may be enforced. It is then pointed out that, strictly speaking, the court does not enforce the option but rather the contract of sale which grows out of the option and to the performance of which the optionee has been able to bind the optionor by reason of the option contract and that, consequently, where the optionee timely and properly elects and tenders, where tender is

<sup>1</sup> *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150; see, also, *Donnally v. Parker*, 5 W. Va. 301; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249; *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830.

necessary, a completed contract of sale is made which is enforceable in equity.

A contract by the terms of which the owners of capital stock in a corporation agree to sell it, at the end of three years, with an option to the purchaser to call it at any time, is not invalid for want of mutuality because one party has an option which the other party has not.<sup>2</sup>

In Washington,<sup>3</sup> the rule is stated that an option to convey land or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it, and the same rule applies to a provision in a contract for the sale of land to re-convey to the vendor, for a certain sum, if and when the purchaser concludes to sell,<sup>4</sup> and also to a straight option to purchase.<sup>5</sup>

The decisions of the federal courts are in accord with the modern and established rule.<sup>6</sup>

<sup>2</sup> *Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. 326, 3 L. R. A. 337; see *Carter v. Hook*, 116 Va. 812, 83 S. E. 386.

<sup>3</sup> *Conner v. Clapp*, 42 Wash. 642, 85 P. 342; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571.

<sup>4</sup> *Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687.

<sup>5</sup> *Wall v. Minn. etc. Ry. Co.*, 86 Wis. 48, 56 N. W. 367; *Cheney v. Cook*, 7 Wis. 413.

<sup>6</sup> *Frank v. Schnuettgen*, 187 Fed. 515, 109 C. C. A. 281; *Marthinson v. King*, 150 Fed. 48, 82 C. C. A. 360; *Waterman v. Waterman*, 27 Fed. 827; *Johnston v. Trippe*, 33 Fed. 530; *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394; *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972; *Couch v. McCoy*, 138 Fed. 696; *Hoogendorn v. Daniel*, 178 Fed. 765, 102 C. C. A. 213; *Willard v. Tayloe*, 8 Wall. (U. S.) 557, 19 L. Ed. 501.

SEC. 1235. MUTUALITY. MISCELLANEOUS CASES.—*Smith v. Reynolds*<sup>1</sup> involved an option or a title bond on a mine by the provisions of which the owners bound themselves to convey upon certain payments being made within a certain time. The suit was for specific performance. It does not appear whether or not there was an election. The optionor sold the property to a third person before the expiration of the option time. Specific performance was denied. The decision seems to be placed on the ground that there was no consideration and that, therefore, the agreement was invalid.

By an instrument signed by both parties, A granted to R the privilege of taking and moving ore from certain of his land, at a certain price per ton, with the privilege, also, of building houses, etc., thereon, the materials to be taken from A's land at R's expense. It was held that such an agreement was merely the privilege of taking ore; that it imposed no obligation on R; and that A could not compel R to work the ore and, since the agreement contained no mutual engagement, it could not be specifically enforced by A.<sup>2</sup>

Where a contract was signed by the owner only and provided that within a certain time he would take a specified price for the mineral interest and upon receipt of such price would make title, the contract, among other things, stating that the vendee bound himself to make such tests as were

<sup>1</sup> *Smith v. Reynolds*, 8 Fed. 696, 3 McCrary 157; see *Maynard v. Brown*, 41 Mich. 298, 2 N. W. 30, optional with vendor to convey or not; *Jenkins v. Locke*, 3 App. D. C. 485.

<sup>2</sup> *Geiger v. Green*, 4 Gill. (Md.) 472; *Gelston v. Sigmund*, 27 Md. 334, turned on the uncertainty in the term of the lease-option.

satisfactory to himself, it was held that the contract was not mutual and binding on all of the parties and specific performance would not be decreed against the proposed purchaser.<sup>3</sup>

SEC. 1236. MUTUALITY. SUMMARY OF DECISIONS. ELECTION RAISES CONTRACT HAVING MUTUALITY OF OBLIGATION, AND, AS A RULE, MUTUALITY OF REMEDY.—The cases reviewed in the preceding sections hold that an unaccepted offer is a nude pact and, therefore, has neither mutuality of remedy nor of obligation; that an option is an offer supported by a consideration or a writing under seal; and that the effect of a consideration is to prevent withdrawal of the offer by the proposer during the time limit. The consideration has the effect of transforming the nude pact offer into a real contract, and it is this feature that prevents withdrawal during the stipulated time. The recognition of this principle of law, however, does not do away with the necessity of accepting the offer, or electing under the option, in order to raise it to a bilateral contract.<sup>1</sup>

The rule to be deduced from the decisions is that the presence or absence of a consideration is negligible in those cases where the offer or option is

<sup>3</sup> *Peacock v. Deweese*, 73 Ga. 570. This case and the *Geiger* case, *supra*, involve the rule that the option is not enforceable against the optionee in the absence of his election. In other words, there is no mutuality in any sense without election.

In *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703, it is pointed out that in the *Peacock* case there was no consideration and the optionee was not in possession as tenant but as licensee.

<sup>1</sup> See Secs. 801, 871.



accepted before its withdrawal, and that where the option is supported by a consideration, an election within the option time is just as effective as in the former case, notwithstanding an attempted withdrawal by the optionor. The effect in both cases is the same in that a bilateral contract is raised. With reference to the effect of an election from the standpoint of mutuality of remedy, the contract raised by the election stands upon the same footing as if the parties had made it in that form in the first instance,<sup>2</sup> and whether or not it has that mutuality of remedy which will entitle the optionee to specific performance, must be determined entirely and exclusively from a consideration of the fact whether or not the act to be performed by the optionee is one which a court of equity, at the time of filing the bill, could and would specifically enforce at the suit of the defendant.

The above statement is made on the assumption that the form of the election is such as to bind the optionee to performance, or is made so by filing a bill, or otherwise, the case being otherwise proper for specific performance.<sup>3</sup>

<sup>2</sup> See *Gilbert v. Port*, 28 Ohio St. 276.

<sup>3</sup> *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; *Frue v. Houghton*, 6 Colo. 318; *Chadsey v. Condley*, 62 Kan. 853, 62 P. 663; *Laning v. Cole*, 4 N. J. Eq. 229; *Naylor v. Parker*, (Tex. Civ. App.) 139 S. W. 93; *Vassault v. Edwards*, 43 Cal. 458; *Bacon v. Kentucky C. Ry. Co.*, 95 Ky. 373, 25 S. W. 747, 16 Ky. L. Rep. 77; *Yerkes v. Richards*, 153 Pa. 646, 26 Atl. 221, 34 A. S. R. 721; *Central L. Co. v. Johnson*, 95 Va. 223, 28 S. E. 175; *Borel v. Mead*, 3 N. M. 84, 2 P. 222.

Refusal of optionor to accept the consideration tendered by optionee on election does not destroy the mutuality, *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485.

The only apparent exceptions to this rule which have come to our attention are those few and peculiar cases, so to speak, where the mutuality of remedy has been surrendered or destroyed, or may, by notice or otherwise, be destroyed, by virtue of the express provisions of the contract itself,<sup>4</sup> or, where the effect of the election made, is merely to give to the optionee the right, say, to explore for oils and minerals, or drill oil wells during a fixed period after the exercise of the option rights, without imposing any obligation on him to do so, in which case, notwithstanding the election, the contract would still lack that mutuality necessary to entitle the optionee to specific performance, for

<sup>4</sup> See Sec. 1222, notes 3 and 4, also *Litz v. Goosling*, 93 Ky. 185, 19 S. W. 527, 14 Ky. L. Rep. 91, 21 L. R. A. (N. S.) 127; *Rutland Marble Co. v. Ripley*, 77 U. S. 339, 19 L. Ed. 955; *So. Express Co. v. Western N. C. R. R. Co.*, 99 U. S. 191, 25 L. Ed. 319; *Rust v. Conrad*, 47 Mich. 449, 11 N. W. 265, 41 Am. Rep. 720; *Appeal of Real Estate T. I. & T. Co.*, 125 Pa. 549, 17 Atl. 450, 11 A. S. R. 920; see Sec. 117.

Whether clause for liquidated damages will prevent specific performance depends on intent of the parties as to whether it was intended to secure performance or give an election to refuse to perform and pay the damages, *Brown v. Norcross*, 59 N. J. Eq. 427, 45 Atl. 605; *Koch v. Streuter*, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Wright v. Suydam*, 72 Wash. 587, 131 P. 239; *Davis v. Isenstein*, 257 Ill. 260, 100 N. E. 940; *Redwine v. Hudman*, 104 Tex. 21, 133 S. W. 426.

A contract giving the purchaser an option to rescind for breach of condition, or to waive the condition is not lacking in the mutuality essential to the right to specific performance, *Catholic Foreign Mission Soc. v. Oussani*, 215 N. Y. 1, 109 N. E. 80.

Under a contract providing that if the prospective purchaser failed to carry out the contract, a deposit made should be forfeited as liquidated damages, and the contract be null and void, when the purchaser elected to complete the contract, the right to terminate his obligation by forfeiture of the deposit is waived and the right to specific performance becomes reciprocal, *Naylor v. Parker*, (Tex. Civ. App.) 139 S. W. 93; see Sec. 109.

the rule is that where it is left to one of the parties to a two-sided executory agreement to choose whether he will perform or abandon it, neither party can have specific performance against the other in a court of equity<sup>5</sup> unless, of course, plaintiff has performed.<sup>6</sup>

SEC. 1237. MUTUALITY. SO-CALLED EXCEPTIONS TO RULE.—It is sometimes said there are exceptions to the equitable rule of mutuality. First, that of an option to purchase land supported by a valuable consideration, and, secondly, that of a contract required by the Statute of Frauds to be in writing. What is meant by the first alleged exception is that the mere fact the option agreement is not enforceable by the optionor against the optionee during the option time limit, is not a bar to specific performance, where a proper

<sup>5</sup> See *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558, 27 Ky. L. Rep. 724; *Smith v. Guffey*, 202 Fed. 106, 120 C. C. A. 436; *Federal Oil Co. v. Western Oil Co.*, 112 Fed. 373; *Stanton v. Singleton*, 126 Cal. 657, 59 P. 146, 47 L. R. A. 334; *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Ulrey v. Keith*, 237 Ill. 284, 86 N. E. 696; *Watford O. & G. Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53.

See *Redwine v. Hudman*, 104 Tex. 21, 133 S. W. 426, where specific performance was granted upon failure of the party to choose the alternative.

<sup>6</sup> See *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907, oil and gas lease; *Carnegie Natural Gas. Co. v. South Penn. Oil Co.*, 56 W. Va. 402, 49 S. E. 548.

See also *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 69 S. E. 195, contract for sale of mineral rights (coal) in land, and requiring final acceptance at specified date and giving the optionee the right thereafter arbitrarily to object to quality of coal, title, etc., and providing if the optionor failed to remove the objection either party might rescind, holding that when optionee accepted the contract, investigated the coal, etc., and finally elected to take the property and called for a deed, he waived the right to interpose arbitrary objections and the vendor was entitled to specific execution of the contract.

and timely election is made. Such a contract does not come within the rule at all.<sup>1</sup>

The second exception is one growing out of the Statute of Frauds, requiring the subscription to the contract by the party sought to be charged, the courts holding that the party not subscribing may have specific performance against the party subscribing. This exception is, perhaps, theoretical, since by filing his bill for specific performance the non-subscribing party has, it is held, thereby supplied the mutuality required by the rule, for if mutuality of remedy exists at that time, the rule is satisfied.<sup>2</sup>

<sup>1</sup> The rule does not apply when a contract by its terms gives the other party a right to performance which it does not give to the other. See *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Johnston v. Trippe*, 33 Fed. 530; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *House v. Jackson*, 24 Ore. 89, 32 P. 1027; *First Nat'l Bank v. Corp. Sec. Co.*, 128 Minn. 341, 150 N. W. 1084.

*Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33, 38, 115 A. S. R. 880, 5 L. R. A. (N. S.) 1194, holding the question of mutuality arises only when the bilateral contract is sought to be enforced.

See *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150, where distinction between mutuality of remedy and of contract is commented on.

The very purpose of an option contract is to extinguish mutuality of right, *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394; *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972.

The rule does not apply to conditional contracts like options, *Weeding v. Weeding*, (1861) 1 John. & H. 424, 4 L. T. (N. S.) 616, 9 Wkly. Rep. 431, 70 Eng. Reprint 812; *Chesterman v. Mann*, (1851) 9 Hare 206.

<sup>2</sup> *Central Land Co. v. Johnson*, 95 Va. 223, 28 S. E. 175; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Naylor v. Parker*, (Tex. Civ. App.) 139 S. W. 93; *Peevey v. Haughton*, 72 Miss. 918, 17 So. 378, 48 A. S. R. 592; *Estes v. Furlong*, 59 Ill. 298; *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500; *Matthes v. Wier*, (Del. Ch.) 84 Atl. 878; *Codding v. Wamsley*, 4 Thomp. & C. (N. Y.) 49, 1 Hun. 585.

There is a further qualification of the rule made in some jurisdictions where the common law rights of married women are in force,<sup>3</sup> but it would seem that full performance, or offer of performance, in such cases, is necessary and if so, then these cases fall within the general exception that the rule of mutuality does not apply in any case where the plaintiff has performed or offers to perform an act

<sup>2</sup> *Miller v. Cameron*, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554, suit by optionor for price, agreement signed by purchaser only.

By filing his bill the purchaser, having tendered, brings himself under the obligation of the contract and comes completely under the power of the court, *Bride v. Reeves*, 36 App. D. C. 476.

“When the non-signing plaintiff brings suit . . . he binds himself to abide by the decision of the court in chancery and so empowers that court to decree specific performance against him.” *Copple v. Aigeltinger*, 167 Cal. 706, 140 P. 1073.

*Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703, holding the rule is firmly settled that in equity for the purpose of obtaining specific execution as well as at law for recovering damages, the signature of the party who makes the engagement is all that the Statute requires and this is put on the additional ground that plaintiff, by his act of filing the bill, has made the remedy mutual, and by signing the bill the agreement is evidenced by writing.

The court may not extend the time to elect as such act would destroy the mutuality, *Pope v. Hoopes*, 90 Fed. 451, 33 C. C. A. 595.

Supplying lack of mutuality by part payment on the price, *Stevens v. Kittredge*, 44 Wash. 347, 87 P. 484; so by tender, *South Florida C. L. Co. v. Walden*, 59 Fla. 606, 51 So. 554; *Thomas v. Gottlieb etc. Co.*, 102 Md. 417, 62 Atl. 633, also holding the test of mutuality is as of date of decree, 62 Atl. 636.

<sup>3</sup> *Yerkes v. Richards*, 153 Pa. 646, 26 Atl. 221, 34 A. S. R. 721; *Warren v. Costello*, 109 Mo. 338, 19 S. W. 29, 32 A. S. R. 669; *Seager v. Burns*, 4 Minn. 141, (4 Gill. 93) married woman as plaintiff in possession; *Weidenbaum v. Raphael*, 83 N. J. Ch. 17, 90 Atl. 683; *Freeman v. Stokes*, 12 Phila. (Pa.) 219; see *Williams v. Graves*, 7 Tex. Civ. App. 356, 26 S. W. 334, homestead; *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076; *Walker v. Owen*, 79 Mo. 563, married woman as plaintiff; *Tillery v. Land*, 136 N. C. 537, 48 S. E. 824.

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which the court can effectively enforce by its decree.<sup>4</sup>

The contract of an infant with an adult is also made an exception, some courts holding the infant may have specific performance where he has fully performed.<sup>5</sup>

SEC. 1238. PERSONS ENTITLED TO SPECIFIC PERFORMANCE. — A volunteer or one who is not within the influence of the consideration of the executory contract, or who does not claim through another who is within it, can not maintain a bill to specifically enforce the performance of the contract.<sup>1</sup> Thus, A sold land to B, receiving an agreement from B to give him the first offer of purchase in case of sale. B sold to C by an absolute deed, and agreed verbally to give his bond to re-convey, on receiving payment of a debt due from B, and he afterwards gave such bond, and it was

<sup>4</sup> See decisions in next preceding note, and as to general rule see *Frue v. Houghton*, 6 Colo. 318; *Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255; *Finlen v. Heinze*, 32 Mont. 354, 80 P. 918, 927; *Perkins v. Hadsell*, 50 Ill. 216, making improvements.

Whether upon mere assent, *quaere*, *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602.

<sup>5</sup> See *Seaton v. Tohill*, 11 Colo. App. 211, 53 P. 170; *Tillery v. Land*, 136 N. C. 537, 48 S. E. 824.

*Vassault v. Edwards*, 43 Cal. 458, 466, or after arriving at majority; also noting married women as an exception to the rule.

<sup>1</sup> *Neves v. Scott*, 50 U. S. 196, 13 L. Ed. 102, s. c. 54 U. S. 268, 14 L. Ed. 140.

Right of one furnishing part of consideration, *Naylor v. Parker*, (Tex. Civ. App.) 139 S. W. 93.

held A was not entitled to specific performance of B's agreement.<sup>2</sup>

Under a statute providing that every action must be prosecuted in the name of the real party in interest, a real estate broker who takes an option for the purchase of property in his own name, but, as a matter of fact, for the benefit of a customer, to whom he demands its conveyance, and having no interest in the contract beyond a contingent commission, in case a sale is made, has no right to maintain a suit for specific performance of the contract.<sup>3</sup>

An undisclosed principal may sue in his own name for the specific performance of the contract entered into by his agent, whether the principal was known or not during the transaction, and whether the owner supposed he was dealing with the agent personally and for his own benefit.<sup>4</sup>

Under an option taken in the name of "B cashier of C Bank," the suit was properly brought in the name of B as the real party in interest.<sup>5</sup>

One of two joint optionees may maintain a suit for specific performance without joining as plaintiff the other optionee who has repudiated the

<sup>2</sup> *Lovering v. Fogg*, 35 Mass. 540; also *McCarthy v. Couch*, 37 Minn. 124, 33 N. W. 777; *Wait v. Wilson*, 83 N. Y. S. 834, 86 App. Div. 485.

But see *Ward v. Ledbetter*, 21 N. C. 496, where the sub-purchaser from the vendee paid the price to the vendee who paid it to the vendor with notice and the sub-purchaser was allowed specific performance.

<sup>3</sup> *Lawyer v. Post*, 109 Fed. 512, 47 C. C. A. 491; see *Randolph v. Wheeler*, 182 Mo. 145, 81 S. W. 419.

<sup>4</sup> *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300; also *Forgey v. Gilbirds*, 262 Mo. 44, 170 S. W. 1135.

<sup>5</sup> *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637.

contract;<sup>6</sup> but one of several optionors may not sue for specific performance as to his parcel after election by the optionee, where the several parcels optioned by them, to his knowledge, were intended to be purchased as a whole.<sup>7</sup>

Upon the death of the optionee, his executor or legatee is the proper party to file the suit.<sup>8</sup> But the rule is not uniform in the several jurisdictions, and, therefore, the decisions of the particular jurisdiction must be consulted.<sup>9</sup>

An execution creditor of the optionee who has not elected is not entitled to enforce specific performance of the option purporting to have been sold under execution.<sup>10</sup>

Equity will not specifically enforce a contract in favor of a plaintiff or a party who has not performed the stipulations thereof on his part. Therefore, if plaintiff refused to purchase, after notice and an opportunity to do so under a "first refusal" option, he is not entitled to specific performance,<sup>11</sup> or in any other case where he has surrendered his option right, or when the option has been discharged.<sup>12</sup>

<sup>6</sup> Schaeffer v. Herman, 237 Pa. 86, 85 Atl. 94. In this case the assignee of the optionee plaintiff was permitted to intervene and the decree went in favor of the assignee; see Gillis v. Arringdale, 135 N. C. 295, 47 S. E. 429.

<sup>7</sup> Vickers v. City of Baltimore, 102 Md. 487, 63 Atl. 120; Tillery v. Land, 136 N. C. 537, 48 S. E. 824.

<sup>8</sup> McCormick v. Stephany, 57 N. J. Eq. 257, 41 Atl. 840.

<sup>9</sup> See Sec. 606.

<sup>10</sup> Costello v. Friedman, 8 Ariz. 215, 71 P. 935.

<sup>11</sup> Cummings v. Nielson, 42 Utah 157, 129 P. 619.

<sup>12</sup> See Sec. 701, *et seq.*



SEC. 1239. NECESSARY AND PROPER PARTIES. ENGLISH RULE. — It is held by some courts that the only necessary parties to a suit for the specific enforcement of a contract are the parties to the contract. This is the English rule applicable to agreements of sale and purchase, and seems to be peculiar to the suit for specific performance. It is quite the opposite of the general rule in equity which requires all persons who have remote and future interests, or equitable interests only, but who are directly affected by the decree, to be made parties, if within the jurisdiction of the court, and, in accordance with this rule, the court will not proceed to decide the case unless they are made parties to the suit.<sup>1</sup>

This rule prevails in some jurisdictions of this country. The reason for the rule is stated thus: the matter actually in controversy in such a suit is the contract and its fulfillment; the estate is not actually involved in the controversy, and persons who claim an interest in the estate but who are wholly unconnected with the contract which it is sought to have performed, are not, therefore, necessary parties to the suit.<sup>2</sup>

Another statement of the rule is that there can be no decree for specific performance except between the parties themselves, or those claiming

<sup>1</sup> Willard v. Tayloe, 75 U. S. 557, 19 L. Ed. 501; citing *Tasker v. Small*, 3 Myl. & C. 63, 40 Eng. Reprint 848.

<sup>2</sup> *Tombler v. Sumpter*, 97 Ark. 480, 134 S. W. 967, where, of course, possession of the property is not sought.

*Steinman v. Hagan*, 108 Va. 563, 62 S. E. 348, suit by vendor against purchaser; *Cella v. Brown*, 144 Fed. 742, 75 C. C. A. 608; *Bacot v. Wetmore*, 17 N. J. Eq. 250; see *Schaeffer v. Herman*, 237 Pa. 86, 85 Atl. 94.

under them in privity of estate, or by representation, for, as it is said, the contract can only be enforced between the parties themselves or their representatives in interest.<sup>3</sup>

In accordance with this rule a purchaser of the vendee is not a necessary party to a suit for specific performance of the contract by the vendor.<sup>4</sup>

SEC. 1240. NECESSARY AND PROPER PARTIES. PREVAILING RULE.—In most jurisdictions of the United States, the rule is that all persons having an interest in the enforcement of the contract must be made parties to the suit and that those interested in the subject matter may be made parties. This, also, is a statement, substantially, of the code rule, adding, however, that in the code states the suit must be prosecuted in the name of the real party in interest. The suit, however, being one for specific enforcement of the contract, it follows, notwithstanding any relaxation of the old rule, that specific performance can not be had except as between the parties to the contract themselves, or those who, by operation of law, or act of the parties, have succeeded to, or acquired the legal title to the property on the one hand, or, the rights of a party under the contract being assign-

<sup>3</sup> See *Hollander v. Central Metal & S. Co.*, 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135.

<sup>4</sup> *Steinman v. Hagan*, *supra*, holding that the assignee of the vendee, though not a party, was bound by the decree for sale of the property for payment of the purchase money due the original vendor.

See, however, *Taylor v. Longworth*, 39 U. S. 172, 10 L. Ed. 405, holding the assignee of a vendee is a necessary party.

able, have acquired such rights by instrument of assignment or conveyance.<sup>1</sup>

Where the contract has been assigned by the vendee, it would seem he is a proper but not a necessary party to a suit by the vendor,<sup>2</sup> or in a suit by the assignee,<sup>3</sup> unless, in the latter case, to settle the validity of the assignment, or where suit is brought by an execution purchaser of the vendee's interest,<sup>4</sup> but some cases hold the vendee is a necessary party.<sup>5</sup>

To entitle the assignee to sue, an election must have been timely and properly made, and the assignee must have succeeded to the entire interest of the assignor and be in such position that specific performance can be enforced against him.<sup>6</sup>

Where the optionee agrees to sell part of his interest to a third person who is to pay part of the price, he is still a proper party,<sup>7</sup> but the owner of a partial interest in the option acquired by him before filing the bill by his assignor is not a necessary party.<sup>8</sup>

As the purpose of the suit is to compel a conveyance of the legal title, it follows that if the

<sup>1</sup> *Schaeffer v. Herman*, 237 Pa. 86, 85 Atl. 94; see Sec. 1241.

<sup>2</sup> *Rose v. Swann*, 56 Ill. 37; *Betton v. Williams*, 4 Fla. 11.

<sup>3</sup> *Kennedy v. Davis's Devisees*, 23 Ky. 372; *Currier v. Howard*, 80 Mass. 511.

<sup>4</sup> See *Shakespeare v. Alba*, 76 Ala. 351. Optionee suing as usee for his assignee, *Sims v. Lide*, 94 Ga. 553, 21 S. E. 220.

<sup>5</sup> *Alexander v. Hoffman*, 70 Ill. 114; *Allison v. Shilling*, 27 Tex. 450, 86 Am. Dec. 622.

<sup>6</sup> *Wheeling Creek G. C. & C. v. Elder*, 170 Fed. 215.

<sup>7</sup> *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195.

<sup>8</sup> *Willard v. Tayloe*, 75 U. S. (8 Wall.) 557, 19 L. Ed. 501.

vendor has conveyed the legal title to the land before the suit is filed, the grantee in whom is vested the legal title is a necessary party,<sup>9</sup> and both vendor and his grantee are proper parties.<sup>10</sup> And generally those acquiring or claiming an interest in the land, obtained from the vendor after the execution of the contract, with notice of plaintiff's rights, are necessary or proper parties.<sup>11</sup>

SEC. 1241. PARTIES PLAINTIFF. — Where the option is assignable, and the optionee has assigned all of his interest under the option and there has been a proper and seasonable election, the suit is properly brought in the name of the assignee.<sup>1</sup> So, where the optionee dies after an election, the devisee under his will may maintain

<sup>9</sup> Atchison T. & S. F. R. Co. v. Benton, 42 Kan. 698, 22 P. 698.

<sup>10</sup> Daily v. Litchfield, 10 Mich. 29. But the vendor is not a necessary party, Van Dyke v. Cole, 81 Vt. 379, 70 Atl. 593; see Waggoner v. Saether, (Ill.) 107 N. E. 859.

<sup>11</sup> Morris v. Hoyt, 11 Mich. 9, necessary; Stone v. Buckner, 20 Miss. 73. But ordinarily if the party has disposed of the legal title to all his interest in the property he should not be made a party, Burrill v. Garst, 19 R. I. 38, 31 Atl. 436.

Undisclosed owners are properly made parties, Hopkins v. Baremore, 99 Minn. 413, 109 N. W. 831.

<sup>1</sup> Wilson v. Seybold, 216 Fed. 975; Perry v. Paschal, 103 Ga. 134, 29 S. E. 703; Robinson v. Perry, 21 Ga. 183, 68 Am. Dec. 455; House v. Jackson, 24 Ore. 89, 32 P. 1027; Kerr v. Day, 14 Pa. 112, 53 Am. Dec. 526; Gustin v. School District, 94 Mich. 502, 54 N. W. 156, 34 A. S. R. 361.

Souffrain v. McDonald, 27 Ind. 269, one joint optionee assigning to other.

Assignment by plaintiff of partial interest in contract is no defense, Willard v. Tayloe, 75 U. S. 557, 19 L. Ed. 501, *contra*; Hurst v. Thompson, 73 Ala. 158.

suit for specific performance,<sup>2</sup> and the same rule obtains with reference to a mortgagee of the vendee,<sup>3</sup> and a purchaser at an execution sale of the vendee's interest,<sup>4</sup> and generally when performance of the covenant would have been decreed between the parties to it, it will be decreed as between persons claiming under them in privity of estate, representation, or title.<sup>5</sup>

The rule does not apply where the contract is not assignable, but it is sometimes held a stipulation against assignment does not prevent the assignee from suing where the option contract has been fully performed or performance tendered.<sup>6</sup>

Where, between the time of the execution of the lease containing a renewal clause and the election to renew, there had been a change in the members of the partnership, but at the time of bringing of the suit the members were the same as when the lease was executed, the members of the then partnership can maintain such suit.<sup>7</sup>

SEC. 1242. PARTIES DEFENDANT. — In accordance with the rule, the party to the contract is a necessary party defendant, unless he has trans-

<sup>2</sup> *Schnuettgen v. Frank*, 213 Fed. 440, 130 C. C. A. 76.

<sup>3</sup> *Ricker v. Moore*, 77 Me. 292; *Thompson v. Justice*, 88 N. C. 269.

<sup>4</sup> *Morgan v. Bouse*, 53 Mo. 219; *Costello v. Friedman*, 8 Ariz. 215, 71 P. 935, but not when there is no election; *Alexander v. Hoffman*, 70 Ill. 114.

<sup>5</sup> *Hollander v. Central M. & S. Co.*, 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135.

<sup>6</sup> *Wagner v. Cheney*, 16 Neb. 202, 20 N. W. 222; *Johnson v. Eklund*, 72 Minn. 195, 75 N. W. 14.

<sup>7</sup> *Fred Gorder & Son v. Pankonin*, 83 Neb. 204, 119 N. W. 449.

ferred his interest under the contract<sup>1</sup> and even in such case he may be a proper party, but the vendor is a necessary party unless he has conveyed the legal title.<sup>2</sup> The person who holds the legal title is a necessary party in order to give the court power to grant the relief.<sup>3</sup>

While the prevailing rule is that all persons claiming title under the option contract are properly made parties, it is not permissible to join persons asserting claims arising out of a subsequent option representing a different transaction.<sup>4</sup>

If A enters into a contract (option) to sell land to B and afterward refuses to perform his contract, and sells the land to C, for a valuable consideration, B may, by bill, compel the purchaser to convey to him, provided he is chargeable with notice, at the time of his purchase, of B's equitable title under the agreement. A purchaser with notice is liable to the same equity, stands in the place of his vendor, and is bound to do that which the person he represents would be bound to do by the decree: he takes the estate subject to the charge and stands

<sup>1</sup> *Town of Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740.

<sup>2</sup> *Slaughter v. Nash*, 11 Ky. 322; see *Coleman v. Dunton*, 99 Me. 121, 58 Atl. 430.

*Campbell v. McFadden*, 9 Tex. Civ. App. 379, 31 S. W. 436, holds that the maker of the contract and his vendees are necessary parties.

Parties who have equitable interest in the land, but no title, are proper, but not necessary parties; if they are omitted their equities will not be affected by the decree, *Robinson v. Robinson*, 116 Ill. 250, 5 N. E. 118.

<sup>3</sup> *Preston v. Walsh*, 10 Fed. 315; *Slaughter v. Nash*, 11 Ky. 322.

<sup>4</sup> *Schaeffer v. Herman*, 237 Pa. 86, 85 Atl. 94.

in place of the vendor.<sup>5</sup> Or, as stated in another leading case, a third person who, with notice of the option rights of another, purchases the land from the optionor, takes title subject to the rights of the optionee and holds it in trust for him, and the optionee may, in equity, follow the land in the purchaser's hands and compel the purchaser to convey the land to him,<sup>6</sup> in which case, of course, the purchaser is a necessary party.<sup>7</sup> On the other hand, specific performance will not be granted where the vendor has sold the property to one who is free from all equities.<sup>8</sup>

- <sup>5</sup> *Veith v. McMurtry*, 26 Neb. 341, 42 N. W. 6; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 A. S. R. 881, 1 Ann. Cas. 986; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Hildreth v. Shelton*, 46 Cal. 382.

Also *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723, 725, the deed to the purchaser was cancelled by the decree.

Where notice of action was recorded, *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 932.

- <sup>6</sup> *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Taylor v. Newton*, 152 Ala. 459, 44 So. 583; *Harper v. Runner*, 85 Neb. 343, 123 N. W. 313; *Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265, Ann. Cas. 1912C, 556; *Crowley v. Byrne*, 71 Wash. 444, 129 P. 113; *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 30 A. S. R. 47, 11 L. R. A. 148; *City of Birmingham v. Forney*, 173 Ala. 1, 55 So. 618; *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150; *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701, 104 A. S. R. 977, 2 Ann. Cas. 421; *Birmingham Canal Co. v. Cartwright*, L. R. 11 Ch. Div. 421; *Dillinger v. Ogden*, 244 Pa. 20, 90 Atl. 446, Ann. Cas. 1915C, 533; *Clough v. Cook*, (Del. Ch.) 87 Atl. 1017.

*Savereux v. Tourangeau*, 16 Ont. L. Rep. 600, where purchaser was brought in by amendment to bill as party defendant.

- <sup>7</sup> *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *Henry v. Black*, 210 Pa. 245, 59 Atl. 1070, 105 A. S. R. 802; *Northern Cent. R. Co. v. Walworth*, 193 Pa. 207, 44 Atl. 253, 74 A. S. R. 683; *Meaney v. Way*, 95 N. Y. S. 745, 108 App. Div. 290.

- <sup>8</sup> *Coleman v. Dunton*, 99 Me. 121, 58 Atl. 430; *Halsell v. Renfrow*, 202 U. S. 287, 50 L. Ed. 1032, 26 S. Ct. 610.

An action will lie against an attorney in fact of the owner if he becomes vested with the title to the land in his own name, or in the name of some other person.<sup>9</sup>

According to the law and practice of particular jurisdictions, the action will lie against the heirs of the vendor<sup>10</sup> or his representative.<sup>11</sup>

SEC. 1243. PARTIES. DOWER AND HOMESTEAD RIGHTS OF WIFE.—Where the title to the land stands in the wife, and she does not sign the option, executed by her husband, and refuses to join in a deed with her husband and release her dower right, the option will not be specifically enforced, unless the purchaser is willing to pay the full price and accept the deed of the husband alone.<sup>1</sup> The wife can not be compelled to release her dower in the land<sup>2</sup> except where she executes the option.<sup>3</sup> If the optionee consents to take the title of the husband subject to the dower right of the wife, a decree will be granted.<sup>4</sup>

<sup>8</sup> But specific performance was allowed where the purchaser was repaid the part payment made by him, *Brinton v. Scull*, 55 N. J. Eq. 747, 35 Atl. 843.

<sup>9</sup> *Thompson v. Myrick*, 20 Minn. 205.

<sup>10</sup> *Butman v. Butman*, 213 Ill. 104, 72 N. E. 821.

<sup>11</sup> *Hollis v. Libby*, 101 Me. 302, 64 Atl. 621.

<sup>1</sup> *Graybill v. Braugh*, 89 Va. 895, 17 S. E. 558, 37 A. S. R. 894, 21 L. R. A. 133; *Hughes v. Antill*, 23 Pa. Sup. Ct. 290; see *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404.

<sup>2</sup> *Sloan v. Williams*, 138 Ill. 43, 27 N. E. 531, 2 L. R. A. 496; *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25; *Krah v. Wassmer*, *supra*.

<sup>3</sup> *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404.

<sup>4</sup> *Jones v. Barnes*, 94 N. Y. S. 695, 105 App. Div. 287; see *Aiple etc. Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652.



Under the Kentucky statute, the wife has no dowerable interest in land on which, before the marriage, the husband had given a company an option to purchase, where the option was exercised within the time limit.<sup>5</sup>

The mere fact that the land under option is a homestead will not bar specific performance.<sup>6</sup> But specific performance will not be decreed against the wife as to homestead property when the option given by the husband is without the wife's signature,<sup>7</sup> unless the homestead was declared after the execution of the option.<sup>8</sup>

SEC. 1244. COMPLAINT OR BILL.—The bill or complaint must allege the contract and its essential terms with certainty and definiteness.<sup>1</sup> If the contract relates to personal property, the bill or complaint must set forth special facts to show the remedy at law is inadequate.<sup>2</sup> If the contract

<sup>5</sup> *Mineral Development Co. v. Hall*, (Ky.) 115 S. W. 230.

<sup>6</sup> *Faraday Coal Co. v. Owens*, 26 Ky. L. Rep. 243, 80 S. W. 1171.

<sup>7</sup> *Miller v. Gray*, 29 Tex. Civ. App. 183, 68 S. W. 517; *Moses v. McClain*, 82 Ala. 370, 2 So. 741.

<sup>8</sup> *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522. Case where wife signed deed with her husband and then placed same in escrow, *Watkins v. Youll*, 70 Neb. 81, 96 N. W. 1042.

<sup>1</sup> *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853, 858; *Horner v. Clark*, 27 Ind. App. 6, 60 N. E. 732, 733.

Form of approval bill for specific performance; see *Frank v. Schnuettgen*, 187 Fed. 515, 109 C. C. A. 281, 282; *Jones v. Robinson*, 17 L. J. Exch. 36; *Ponsford v. Hankey*, 2 Giff. 604, 66 Eng. Reprint 253.

Necessary allegations, see *Swanston v. Clark*, 153 Cal. 300, 95 P. 1117.

As to definiteness and certainty of terms in the option contract, see Secs. 209, 214.

<sup>2</sup> *Young v. Matthew Turner Co.*, 168 Cal. 671, 143 P. 1029; *Manton v. Ray*, 18 R. I. 672, 29 Atl. 998, 49 A. S. R. 811, sufficiency of allegations that stock has no market value, etc.; see Sec. 1210.

relates to real property, it is not necessary to allege inadequacy of remedy at law, as that fact appears from the subject matter.<sup>3</sup>

The bill or complaint should show, by proper allegations, that the contract sought to be enforced is complete;<sup>4</sup> that it is founded upon a valuable and adequate consideration;<sup>5</sup> and in California by force of statute, that as to the defendant, it is just and reasonable, and it must also appear that it will not be inequitable to enforce the contract,<sup>6</sup> and, further, that the contract is capable of being specifically enforced against both parties.<sup>7</sup>

The land or property must be described in the bill or complaint with sufficient certainty to enable the court to frame a decree for its conveyance,<sup>8</sup> or to ascertain the boundaries through a survey.<sup>9</sup> The bill or complaint must show that plaintiff has

<sup>3</sup> *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; see Sec. 1209.

<sup>4</sup> *Horner v. Clark*, 27 Ind. App. 6, 60 N. E. 732, 733.

<sup>5</sup> *Young v. Matthew Turner Co.*, 168 Cal. 671, 143 P. 1029, holding the rule that a writing is presumptive evidence of consideration does not apply; see Secs. 324, 1205.

Sufficiency of allegation of adequacy of consideration and fairness of contract, *Walter G. Reese Co. v. House*, 162 Cal. 740, 124 P. 442.

Not sufficient to allege in *haec verba* that consideration is adequate, *Joyce v. Tomasini*, 168 Cal. 234, 142 P. 67.

<sup>6</sup> *Kaiser v. Barron*, 153 Cal. 788, 96 P. 806; *Young v. Matthew Turner Co.*, 168 Cal. 671, 143 P. 1029; *Joyce v. Tomasini*, *supra*; *Loeffler v. Wright*, 13 Cal. App. 224, 109 P. 269.

In Montana, under a statute similar to that of California, inadequacy of consideration is held matter of defense, *Finlen v. Heinze*, 28 Mont. 548, 73 P. 123.

<sup>7</sup> *Horner v. Clark*, 27 Ind. App. 6, 60 N. E. 732.

<sup>8</sup> *Harper v. Kellar*, 111 Ga. 420, 35 S. E. 667; *Gray v. Davis*, 26 Ky. 381; see Sec. 214.

<sup>9</sup> *Allen v. Chambers*, 39 N. C. 125.

timely elected<sup>10</sup> and performed, or offered to perform, the conditions precedent of the contract on his part,<sup>11</sup> and that timely and proper notice of election has been given to the optionor;<sup>12</sup> defendant's failure or refusal to perform;<sup>13</sup> that the

<sup>10</sup> *Storch v. Duhnke*, 76 Minn. 521, 79 N. W. 533.

*Hanes v. Newport*, 134 Ill. App. 453, but need not allege a written election, *Kroll v. Diamond Match Co.*, 106 Mich. 127, 63 N. W. 983; *New England Box Co. v. Prentiss*, 75 N. H. 246, 72 Atl. 826, reasonable time to accept.

<sup>11</sup> *Dixon v. Dixon*, 92 Md. 432, 48 Atl. 152; *Chadbourn v. Stockton etc. Loan Soc.*, 88 Cal. 636, 26 P. 529; *Cates v. McNeil*, (Cal.) 147 P. 944.

As to performance by optionee generally, see Secs. 714, 717.

Failure to allege offer to pay consideration or willingness to do so, is fatal, *Loeffler v. Wright*, 13 Cal. App. 224, 109 P. 269.

When price of lumber is to be fixed by third person, failure to allege price has been fixed by such person is fatal, *Southern Sawmill Co. v. Baldwin L. Co.*, 120 La. 975, 45 So. 961.

So when complaint fails to allege that plaintiff insured the property for benefit of optionor, the option contract obligating him so to do, or that plaintiff had paid certain rent, *Chadbourn v. Stockton etc. Soc.*, 88 Cal. 636, 26 P. 529.

Allegation that plaintiff "elected" to pay, etc., is one of fact, *Eisner v. Pringle Memorial Home*, 115 N. Y. S. 58, 130 App. Div. 559.

<sup>12</sup> *Hull v. Angus*, 60 Ore. 95, 118 P. 284.

<sup>13</sup> Sufficiency of allegation where optionor refuses, *Taylor v. Newton*, 152 Ala. 459, 44 So. 583; *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637; *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12, 63 A. S. R. 193; *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586, 12 Ann. Cas. 88.

When the complaint alleges that at the time plaintiff gave notice of acceptance, defendant refused, etc., to perform, it must show that the contract was completed before the offer was withdrawn. This is on the theory that where the acceptance and withdrawal are contemporaneous, there is no contract because there is no "meeting of the minds of the parties at the time of giving the notice of acceptance," etc. This would only apply to a pure offer, *Storch v. Duhnke*, 76 Minn. 521, 79 N. W. 533; see *Head v. Diggon*, 3 M. & Ry. 97, 7 L. J. (O. S.) K. B. 36.

defendant is the owner of the property;<sup>14</sup> and, also, according to some cases and on special facts, a demand of performance,<sup>15</sup> as well as a demand for, or a tender of deed of conveyance, in conformity to the law or custom of the particular jurisdiction.<sup>16</sup>

Where payment or tender is necessary, that fact must be alleged<sup>17</sup> or facts showing its waiver, or the facts excusing the same,<sup>18</sup> and a tender in

<sup>14</sup> *Ide v. Leiser*, 10 Mont. 5, 24 P. 695, 24 A. S. R. 17; *Manton v. Ray*, 18 R. I. 672, 29 Atl. 998, 49 A. S. R. 811, stock; *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404, possession by vendee; *Morrissey v. Strom*, 57 Wash. 487, 107 P. 191; *Christiansen v. Aldrich*, 30 Mont. 446, 76 P. 1007; *DeFord v. Hyde*, 10 S. D. 386, 73 N. W. 265; *Brehm v. Sperry*, 92 Md. 378, 48 Atl. 368.

Attaching copy of lease as exhibit to bill shows ownership, *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871.

<sup>15</sup> *Chesbrough v. Vizard Inv. Co.*, 156 Ky. 149, 160 S. W. 725, but not when defendant has put it out of his power to perform or has repudiated the agreement, *Monarch P. Co. v. Washburn*, 89 Kan. 874, 133 P. 156.

<sup>16</sup> *Horner v. Clark*, 27 Ind. App. 6, 60 N. E. 732, 735; *Wellmaker v. Wheatley*, 123 Ga. 201, 51 S. E. 436; *Miller v. Cameron*, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554; *Bell v. Wright*, 31 Kan. 236, 1 P. 595, refusal to execute; *Dowdney v. McCullom*, 59 N. Y. 367; *Goodale v. West*, 5 Cal. 339; *Seeley v. Howard*, 13 Wis. 336; *Ashurst v. Peck*, 101 Ala. 499, 14 So. 541; *Burns v. Fox*, 113 Ind. 205, 14 N. E. 541.

<sup>17</sup> *Rude v. Levy*, 43 Colo. 482, 96 P. 560, 24 L. R. A. (N. S.) 91, 127 A. S. R. 123; *Grier v. Stewart*, (Tex. Civ. App.) 136 S. W. 1176; *Levy v. Lyon*, 153 Cal. 213, 94 P. 881; *Loeffler v. Wright*, 13 Cal. App. 224, 109 P. 269; *Deitz v. Stephenson*, 51 Ore. 596, 95 P. 803; allegation of readiness, etc., not sufficient, *Heine v. Treadwell*, 72 Cal. 217, 13 P. 503.

<sup>18</sup> Allegation of tender and refusal, held sufficient, *Herman v. Winter*, 20 S. D. 196, 105 N. W. 457; *Finlen v. Heinze*, 32 Mont. 354, 80 P. 918; see *Heine v. Treadwell*, 72 Cal. 217, 13 P. 503; *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637.

Rule where optionor evades, *Guilford v. Mason*, 22 R. I. 422, 48 Atl. 386; *West v. Wash. & C. R. Ry.*, 49 Ore. 436, 90 P. 666.

the pleadings, without payment, is not, as a rule, sufficient.<sup>19</sup>

Plaintiff must allege and show the amount of purchase money due defendant;<sup>20</sup> and that plaintiff is ready, able, and willing to perform the contract on his part.<sup>21</sup> A general allegation of readiness, etc., is sufficient.<sup>22</sup>

<sup>19</sup> See *Carpenter v. Thornburn*, 76 Ark. 578, 89 S. W. 1047; *Deitz v. Stephenson*, 51 Ore. 596, 95 P. 803, 808.

This is a correct statement of the rule in the Arkansas case where tender was a condition precedent to the right to maintain the suit, see *Rude v. Levy*, *supra*.

But there may be special circumstances which will permit plaintiff to make tender in his complaint, *Libby v. Parry*, 98 Minn. 366, 108 N. W. 299; *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228, 230. Thus, when optionor conveyed and died before expiration of option time, the assignee of the optionee is entitled to have all of the parties brought in court so that upon payment of the money plaintiff will be able to obtain a valid conveyance, *Maughlin v. Perry*, 35 Md. 352.

So, when the optionor refuses to convey, offer in the complaint to pay the price is sufficient, see *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586, 12 Ann. Cas. 88; see, also, *Stevens v. Kittredge*, 44 Wash. 347, 87 P. 484, delay of optionor in delivering abstract and deed; also *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426, 436.

So, also, when the option gives plaintiff the "refusal" of the property at a price as low as any other *bona fide* offer for it, *Cummings v. Nielson*, 42 Utah 157, 129 P. 619.

Price deposited in court, see *Byers v. Denver C. R. Co.*, 13 Colo. 552, 22 P. 951; *Stevens v. Kittredge*, 44 Wash. 347, 87 P. 484; *Mason v. Payne*, 47 Mo. 517, minors.

<sup>20</sup> *Coleman v. Easterling*, 93 Ga. 29, 18 S. E. 819, but failure to allege the precise amount is not always fatal, *Hull v. Peer*, 27 Ill. 312.

<sup>21</sup> *Finlen v. Heinze*, 32 Mont. 354, 80 P. 918; *Deitz v. Stephenson*, 51 Ore. 596, 95 P. 803; see *U. B. Blalock & Co. v. W. D. Clark & Bro.*, 133 N. C. 306, 45 S. E. 642.

When defendants are minors, *Mason v. Payne*, 47 Mo. 517. Facts not showing inability to pay price, *Brown v. Reichling*, 86 Kan. 640, 121 P. 1127.

<sup>22</sup> *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637; *Wilson v. Clark*, 35 Tex. Civ. App. 92, 79 S. W. 649; *Kissack v. Bourke*, 224 Ill. 352, 79 N. E. 619.

An allegation that plaintiff is the assignee of the option contract without setting forth the circumstances tending to prove that fact, is sufficient.<sup>23</sup>

Where the contract sued on is oral, and it is sought to take it out of the operation of the Statute of Frauds, by reason of part performance, it is necessary to allege the terms of the contract with definiteness and certainty and to set forth clearly and fully the acts constituting the part performance, and it must appear from the face of the complaint that a refusal of the specific enforcement of the contract will work a fraud upon plaintiff.<sup>24</sup>

When, in a suit for specific performance of an option contract to sell a fractional interest in a vessel, the supplemental complaint alleged that the interest had been sold *pendente lite* for a specified sum and that no part thereof had been paid to plaintiff, and did not allege that plaintiff had been damaged in that or any other amount, the action could not be maintained as one to recover damages for breach of contract.<sup>25</sup>

## SEC. 1245. REFORMATION OF CONTRACT.

—It is proper practice to frame a bill or complaint for reformation of the option contract and in the

<sup>22</sup> But it is not sufficient as a tender of performance, *Clarno v. Grayson*, 30 Ore. 111, 46 P. 426, 436, especially in pleading under mutual and dependent covenants. In such case performance or offer of performance by one party is necessary to put the other in default.

<sup>23</sup> *Hollander v. Central Metal etc. Co.*, 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135.

<sup>24</sup> *Horner v. Clark*, 27 Ind. App. 6, 60 N. E. 732, 733; *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404, affirmed in 78 N. J. Eq. 305, 81 Atl. 1133; *Hanes v. Newport*, 134 Ill. App. 453, see as to part performance, Secs. 418, 1207, 1208.

<sup>25</sup> *Young v. Matthew Turner Co.*, 168 Cal. 671, 143 P. 1029.

same pleading, upon proper allegations for that purpose, pray for its specific performance as reformed. Of course, the complaint must set forth sufficient facts to entitle plaintiff to reformation.<sup>1</sup> The ground upon which reformation is usually sought is mistake, but the mistake, in accordance with the rule on the subject, must be mutual, that is, the mistake of both parties and not the mistake of one.

Thus, where there is a mutual mistake in the description of the property, plaintiff may bring suit to reform such description and to enforce the contract as reformed.<sup>2</sup> So, also, where there is a mistake of the scrivener, acting as the mutual agent of both parties, in drafting the contract,<sup>3</sup> or a mutual mistake of both parties in leaving out an option clause in a lease of the land.<sup>4</sup>

<sup>1</sup> *Meek v. Hurst*, 223 Mo. 688, 122 S. W. 1022; *Swanston v. Clark*, 153 Cal. 300, 95 P. 1117; *Butler v. Threlkeld*, 117 Iowa 116, 90 N. W. 584.

<sup>2</sup> *Pope v. Hoopes*, 90 Fed. 451, 33 C. C. A. 595.

<sup>3</sup> *Meek v. Hurst*, *supra*.

<sup>4</sup> *Butler v. Threlkeld*, 117 Iowa 116, 90 N. W. 584; see *Collier v. Robinson*, (Tex. Civ. App.) 129 S. W. 389, not allowed on facts.

When the parties, intending to grant an option, draft the agreement in language, the legal effect of which is to make it a sale, equity will reform the contract in accordance with the intent of the parties, *Hopwood v. McCausland*, 120 Iowa 218, 94 N. W. 469. But will not grant specific performance if unjust or inequitable as to one of the parties. *Id.*

Rule as to reformation by court where grounds apparent from face of instrument, *Torrey v. McFadyen*, 165 N. C. 237, 81 S. E. 296, the general rule being that in the absence of proper pleading asking reformation, evidence is inadmissible, *Wellmaker v. Wheatley*, 123 Ga. 201, 51 S. E. 436.

Written contracts can not be reformed except upon most positive and satisfactory evidence showing fraud or mistake in committing the agreement to writing, that is, mistake of one party and fraud of the other, or mutual mistake, *Braun v. Wis. Rendering Co.*, 92 Wis. 245, 66 N. W. 196.

SEC. 1246. DEMURRER. CROSS COMPLAINT. ANSWER.—By demurrer the defendant may test the sufficiency of the bill.<sup>1</sup> In a suit for specific performance the defendant may file a cross complaint or a counterclaim,<sup>2</sup> but this would seem to be unnecessary where plaintiff offers or tenders the relief sought or the demand claimed by the defendant, and in an action at law, in most states, the defendant has a right, in a proper case, to a decree for specific performance on his cross complaint, such as in unlawful detainer,<sup>3</sup> ejectment,<sup>4</sup> and in some other actions.<sup>5</sup>

## SEC. 1247. DAMAGES IN LIEU OF OR AS INCIDENT TO SPECIFIC PERFORMANCE.

—The general rule is that if plaintiff, in good faith, brings his suit for specific performance and some act of defendant, or other circumstance, renders a

<sup>1</sup> *Cheney v. Cook*, 7 Wis. 413, but will not consider the equitable circumstances of the case as change of value, etc., until the coming in of the answer and proofs; also *Tavener v. Barrett*, 21 W. Va. 656; *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 51 N. E. 408, 68 A. S. R. 749, 43 L. R. A. 854.

<sup>2</sup> Damages for use and occupation may be set off against contract price, *Gira v. Harris*, 14 S. D. 537, 86 N. W. 624.

Abatement of price, *White v. Weaver*, 68 N. J. Eq. 644, 61 Atl. 25; *Tilton v. Sterling W. Co.*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689.

Not inconsistent as defense to plead instrument as option and also as agreement to purchase, *Bluegrass Realty Co. v. Shelton*, 148 Ky. 666, 147 S. W. 33.

<sup>3</sup> See *Walker v. Edmundson*, 111 Ga. 454, 36 S. E. 800.

But not in Justice Court, *Blount v. Connolly*, 110 Mo. App. 603, 85 S. W. 605.

<sup>4</sup> *Stockton v. Herron*, 3 Idaho, 581, 32 P. 257.

<sup>5</sup> Rescission, *Swanston v. Clark*, 153 Cal. 300, 95 P. 1117.



decree impossible, or impracticable, the court will retain the suit and award plaintiff damages.<sup>1</sup>

Thus, when in a bill by a vendor to enforce specific performance of a contract for the sale of land, under which the vendee might relieve himself from the purchase by paying a stipulated sum, the right of the vendor to come into a court of equity being clear, the court, in refusing to decree specific performance, may decree payment of such stipulated sum to the vendor, although he could have recovered the same at law.<sup>2</sup>

The optionee, in specific performance, may recover damages against the optionor for withholding possession, and also for delay in conveying.<sup>3</sup>

**SEC. 1248. DEFENSES.**—The defenses to a suit for specific performance have already been made to appear in the discussion of the preceding chapters. For convenience they are here enumerated, but it

<sup>1</sup> *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 932, 934; see *Milmo v. Murphy*, 65 N. J. Eq. 767, 56 Atl. 292.

Plaintiff may join count for damages for breach, in the event specific performance can not be decreed, *Naylor v. Parker*, (Tex. Civ. App.) 139 S. W. 93.

Sufficiency of complaint, *Marsh v. Lott*, 156 Cal. 643, 105 P. 968.

Abatement of price, *Tilton v. Sterling C. Co.*, 28 Utah 173, 77 P. 758, 107 A. S. R. 689.

Not entitled to abatement in price for railroad right of way over land, the presumption being the right of way as an incumbrance was considered in fixing the price, it being obvious, *Wetherby v. Griswold*, (Ore.) 147 P. 388.

When building destroyed by fire, *Gamble v. Garlock*, 116 Minn. 59, 133 N. W. 175.

<sup>2</sup> *Catheart v. Robinson*, 30 U. S. (5 Pet.) 264, 8 L. Ed. 120.

<sup>3</sup> *Beddow v. Flage*, 22 N. D. 53, 132 N. W. 637; see *West v. Washington etc. Railroad*, 49 Ore. 436, 90 P. 666.

is beyond the scope of this book to present more than an outline.

Among the defenses available in a suit for specific performance are these:

- (a) Want or lack of mutuality.<sup>1</sup>
- (b) Fraud,<sup>2</sup> and illegality.<sup>3</sup>
- (c) Statute of Frauds.<sup>4</sup>
- (d) Mistake.<sup>5</sup>
- (e) Inadequacy of consideration.<sup>6</sup>
- (f) Special circumstances rendering specific performance inequitable.<sup>7</sup>

<sup>1</sup> See Secs. 1214 *et seq.*

<sup>2</sup> See Sec. 217; *Grand Rapids G. H. & M. Ry. Co. v. Stevens*, 143 Mich. 646, 107 N. W. 436.

That the misrepresentation was innocently made, is immaterial, *Ginther v. Townsend*, 114 Md. 122, 78 Atl. 908; must be relied on, *Clough v. Cook*, (Del. Ch.) 87 Atl. 1017.

Misrepresentation as a defense, is not tested by rule at law, *Bowker v. Cunningham*, 78 N. J. Eq. 458, 79 Atl. 608.

<sup>3</sup> See Secs. 215, 1204.

<sup>4</sup> See Secs. 401-419.

<sup>5</sup> See Sec. 217; also *McCormick v. Stephany*, 57 N. J. Eq. 257, 41 Atl. 840; *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613.

Belief that instrument was an option is no defense, *Lenman v. Jones*, 222 U. S. 51, 56 L. Ed. 89, 32 S. Ct. 18.

Failure to include in written contract, part of oral agreement, *Jasper County El. Ry. Co. v. Curtis*, 154 Mo. 10, 55 S. W. 222, but omission of terms through defendant's negligence does not defeat specific performance, *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404.

Whether mistake is mutual is immaterial, *Caplan v. Buckner*, 123 Md. 590, 91 Atl. 481.

<sup>6</sup> See Secs. 324, 1205.

Rule applies to agreement of sale and not to the option, *Marsh v. Lott*, 8 Cal. App. 384, 97 P. 163.

<sup>7</sup> See Sec. 1204; also *Rice v. Lincoln etc. R. Co.*, 88 Neb. 307, 129 N. W. 425; *Rider v. Gray*, 10 Md. 282, 69 Am. Dec. 135.

*Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321, 12 Ann. Cas. 120, lack of time limit and inadequacy of consideration; grub stake contract.

(g) Untimely or conditional election.<sup>8</sup>

(h) Non-performance by plaintiff,<sup>9</sup> including lack of payment or tender when necessary.<sup>10</sup>

(i) Lack of ability, etc., of plaintiff to perform.<sup>11</sup>

(j) Lack of title or defective or encumbered title.<sup>12</sup>

(k) Valuation of land or arbitration to fix price, when necessary.<sup>13</sup>

The above defenses may, in a way, be said to arise from the acts of the parties. In addition to the above are the following:

(l) Indefiniteness or uncertainty in the terms of the option.<sup>14</sup>

<sup>7</sup> Not inequitable because no time was specified for delivery of deed, *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522. *Bluegrass Realty Co. v. Shelton*, 148 Ky. 666, 147 S. W. 33, purchaser not compelled to accept deed reserving grave yard not mentioned in contract.

<sup>8</sup> See Secs. 837, *et seq.*; Sec. 871; *Bennett v. Giles*, 220 Ill. 393, 77 N. E. 214.

<sup>9</sup> See Secs. 714, 871, 1204; see *Forbes v. Connolly*, 5 Grant Ch. (U. C.) 657.

Abandonment is bar, *May v. Getty*, 140 N. C. 310, 53 S. E. 75; *Lasher v. Loeffler*, 190 Ill. 150, 60 N. E. 85; *Meidling v. Trefz*, 48 N. J. Eq. 638, 23 Atl. 824; see Secs. 710, *et seq.*

<sup>10</sup> See Sec. 916.

<sup>11</sup> See Sec. 1244, note 22; *Hessell v. Neal*, 25 Colo. App. 300, 137 P. 72. Facts not showing inability, *Brown v. Reichling*, 86 Kan. 640, 121 P. 1127.

<sup>12</sup> See Sec. 1005, *et seq.*; *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; *Joffrion v. Gumbel*, 123 La. 391, 48 So. 1007.

This defense is not available to defendant when plaintiff is willing to accept such title as defendant has, *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 932, 934.

<sup>13</sup> See Secs. 1212, 1213.

<sup>14</sup> See Secs. 209-214, 1204; *Marsh v. Lott*, 8 Cal. App. 384, 97 P. 163; *Clinchfield Coal Co. v. Powers*, 107 Va. 393, 59 S. E. 370, acreage.

(m) When a decree would be ineffectual or not beneficial.<sup>15</sup>

(n) When a decree could not be conveniently enforced by the court or would require continuous supervision to carry it into effect.<sup>16</sup>

(o) Where the decree would work injustice to third parties<sup>17</sup> or to the defendant.<sup>18</sup>

(p) Statute of Limitations.<sup>19</sup>

(q) Laches.<sup>20</sup>

(r) Adequate remedy at law.<sup>21</sup>

(s) Increase or decrease in value.<sup>22</sup>

A purely legal defense is not looked upon favorably by the court, when the equities are with plaintiff, and in such case the defense must be clearly established.<sup>23</sup>

SEC. 1249. DEFENSES. INCREASE OR DECREASE IN VALUE. — The mere fact that the value of the property has increased or decreased since the execution of the contract will not, ordinarily, warrant a refusal of specific performance

<sup>15</sup> *Alworth v. Seymour*, 42 Minn. 526, 44 N. W. 1030; *Adams v. Patrick*, 30 Vt. 516.

<sup>16</sup> See Sec. 1204, note 3.

<sup>17</sup> See Sec. 1204, note 7.

<sup>18</sup> See Sec. 1204, note 6; *Hedgecock v. Tate*, (N. C.) 85 S. E. 34, executor not personally liable under his option where it was necessary to secure deed of heirs, the optionee knowing the facts.

<sup>19</sup> See Sec. 1251.

<sup>20</sup> See Sec. 1250; lack of diligence rendering grant of specific performance inequitable, *Nobles v. L'Engle*, 61 Fla. 696, 55 So. 839.

<sup>21</sup> See Secs. 1209, 1210.

<sup>22</sup> See Sec. 1249.

<sup>23</sup> *Page v. Martin*, 46 N. J. Eq. 585, 20 Atl. 46.

where there is absence of fraud or bad faith.<sup>1</sup> The value will be determined as of the time of making the contract,<sup>2</sup> but specific performance will not be decreed where it appears the buyer has unreasonably delayed, either to do the acts required to be done by him to complete the contract, or to seek its enforcement, and where, during such delay, a material increase in value of the land has taken place.<sup>3</sup>

SEC. 1250. LACHES.—Mere lapse of time, short of the Statute of Limitations, is not a reason for dismissing a suit in equity for specific performance. There must, in addition, be circumstances rendering a decree inequitable. Each case must be determined from its own circumstances. Thus, where the option, based upon a consideration of 25 cents and extending over a period of three months, for the purchase of property worth \$100,000, is expressly repudiated by the optionor before there has been an election by the optionee, and is again repudiated when notice of election to purchase is given, the

<sup>1</sup> King v. Raab, 123 Iowa 632, 99 N. W. 306, if without fault of either party; Anderson v. Anderson, 251 Ill. 415, 96 N. E. 265, Ann. Cas. 1912C, 556; Willard v. Tayloe, 8 Wall. (U. S.) 557, 19 L. Ed. 501. Increase in value and laches; see Sec. 1250.

<sup>2</sup> Anderson v. Anderson, *supra*; House v. Jackson, 24 Ore. 89, 32 P. 1027, 1030; Peterson v. Chase, 115 Wis. 239, 91 N. W. 687.

<sup>3</sup> Meidling v. Trefz, 48 N. J. Eq. 638, 23 Atl. 824; Joffrion v. Gumbel, 123 La. 391, 48 So. 1007; Kellow v. Jory, 141 Pa. 144, 21 Atl. 522; Kentucky Iron etc. Co. v. Adams, 32 Ky. L. Rep. 823, 106 S. W. 1198; Anderson v. Anderson, *supra*; Standiford v. Thompson, 135 Fed. 991, 68 C. C. A. 425; Stevens v. McChrystal, 150 Fed. 85; Willard v. Tayloe, 8 Wall. (U. S.) 557, 19 L. Ed. 501; Central Land Co. v. Johnson, 95 Va. 223, 28 S. E. 175, decrease; right of vendor to rescind, Vance v. Newman, 72 Ark. 359, 80 S. W. 574, 105 A. S. R. 42.

delay of the optionee, for more than three years from the refusal of his tender, during which time the property has greatly increased in value, if unexplained, constitutes an acquiescence in the optionor's repudiation of the contract, and prevents specific performance in a suit by the optionee.<sup>1</sup> But a delay of two years, on the part of the optionee, is not sufficient to bar specific performance when it appears that the optionor would not have made a deed, if payment had been made and a deed demanded,<sup>2</sup> or where the optionee goes into possession and makes valuable improvements,<sup>3</sup> or where delay is caused by *bona fide* efforts to settle and compromise,<sup>4</sup> or where a tenant was continuously in possession of the premises for four years

<sup>1</sup> Marsh v. Lott, 156 Cal. 643, 105 P. 968.

Laches and increase in value, see Stevens v. McChrystal, 150 Fed. 85, delay of 5 years, Meidling v. Trefz, 48 N. J. Eq. 638, 23 Atl. 824; Kentucky Iron etc. Co. v. Adams, 32 Ky. L. Rep. 823, 106 S. W. 1198.

It would be an unwarrantable exercise of discretionary power to allow one holding a mere option to purchase, to lie by for a long time and speculate on the fluctuating value of property and after a substantial increase in value, to enforce a conveyance at the original price, Joffrion v. Gumbel, 123 La. 391, 48 So. 1007.

See Davis v. Petty, 147 Mo. 374, 48 S. W. 944, when defendant had made improvements.

Vickery v. Maier, 164 Cal. 384, 129 P. 273, case of option to re-purchase stock at any time after six months.

<sup>2</sup> Penn. Min. Co. v. Martin, 210 Pa. 53, 59 Atl. 436.

<sup>3</sup> Schields v. Horbach, 28 Neb. 359, 44 N. W. 465; Byers v. Denver C. R. Co., 13 Colo. 552, 22 P. 951, contract partly executed and possession taken.

Otherwise where there is great delay, Blanchard v. Jackson, 55 Kan. 239, 37 P. 986.

Division line agreement and option to purchase to conform to line established, Calanchini v. Branstetter, 84 Cal. 249, 24 P. 149.

<sup>4</sup> Houghwout v. Boisaubin, 18 N. J. Eq. 315.

after offer to pay the price under the option in the lease.<sup>5</sup>

There must be no unnecessary delay, especially in cases where to grant specific performance will work hardship on the defendant.<sup>6</sup> The law requires plaintiff to be prompt in the enforcement of his rights, for, in an option contract, time is of the essence.<sup>7</sup>

An unexplained delay of five years will defeat specific performance.<sup>8</sup> Where the option time is not definitely fixed, demand should be made within a reasonable time, and eight years is not a reasonable time.<sup>9</sup>

<sup>5</sup> *Master v. Roberts*, 224 Pa. 342, 90 Atl. 735.

The possession of the vendee is a continuous assertion of his claim, *Hargis v. Ederington*, (Ark.) 168 S. W. 1095; *Sewell v. Peavey*, (Ala.) 65 So. 803.

<sup>6</sup> *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; see *Kellow v. Jory*, 141 Pa. 144, 21 Atl. 522.

<sup>7</sup> Plaintiff must show himself "ready, desirous, prompt and eager to perform the contract on his part," *Meidling v. Trefz*, 48 N. J. Eq. 638, 23 Atl. 824; *Penn Min. Co. v. Martin*, 210 Pa. 53, 59 Atl. 436; *Roberts v. Braffett*, 33 Utah 51, 92 P. 789.

<sup>8</sup> *Bauer v. Lumaghi Coal Co.*, 209 Ill. 316, 70 N. E. 634.

*Fitch v. Willard*, 73 Ill. 92, 5 years' delay in rejecting title shown by abstract.

To same point, 3½ years' delay, *Hoyt v. Tuxbury*, 70 Ill. 331; *Spafford v. Hedges*, 231 Ill. 140, 83 N. E. 129, 15 years; *Swank v. Fretts*, 209 Pa. 625, 59 Atl. 264, 2½ years.

Of lessor to terminate lease and option, *Lewis v. Agoure*, 8 Cal. App. 146, 96 P. 327.

There is not laches when the delay is due to request of the optionor, *Wheatland v. Silsbee*, 159 Mass. 177, 34 N. E. 192.

Nor within the period of statutory limitation, when no time is fixed for performance and delivery of deed and payment of price are concurrent acts, there being no tender or demand, *Bright v. James*, 35 R. I. 492, 85 Atl. 545.

<sup>9</sup> *Heydrick v. Dickey*, 154 Ky. 475, 157 S. W. 915, 159 S. W. 666.

The defense of laches, as a general rule, is not available unless pleaded.<sup>10</sup>

SEC. 1251. TIME TO SUE.—The time when plaintiff becomes entitled to sue for specific performance must be ascertained from the terms of the option contract and the acts of the parties thereunder as maturing or perfecting his right of action. Thus, plaintiff and defendant carried on the business of surgeons as partners under articles of partnership, providing that in case either of the parties should desire to retire and should give twelve calendar months' notice of intention of such desire to the other party, the continuing party should have the option to become the purchaser of the share of the retiring partner, for a certain sum, provided the option was exercised within a certain time after notice of retiring. August 15, 1856, defendant served upon plaintiff a proper notice to retire from business. Thereafter disputes having arisen as to the conduct of certain portions of the business tending to reduce the value of the business, the defendant on the 13th of September following served upon plaintiff notice of dissolution of the partnership on the ground of alleged breach of the partnership articles. Later, on the same date, plaintiff served notice, under the articles, of his intention to exercise the option to purchase in accordance with his notice previously given, and the evidence failing to show breach of the partnership articles by plaintiff, it was held defendant was not entitled to a dissolution of the

<sup>10</sup> *Smith v. Russell*, 20 Colo. App. 554, 80 P. 474.



articles, and that the partnership business must be continued until the expiration of the twelve months after service by plaintiff of the notice to purchase.<sup>1</sup>

If one party to a continuing contract consisting of mutual obligations, renounces and repudiates it prior to the date fixed for performance, the other party is at liberty, immediately to treat such renunciation as a breach of the contract and sue for damages sustained therefrom, or to treat the contract as still binding and wait until the time arrives for performance, in order to give the party who has repudiated the contract an opportunity to comply with its terms.<sup>2</sup>

But where the contract is for the sale of land and the seller renounces and repudiates the contract before the time specified for execution of the deed and the surrender of possession, the seller not putting it out of his power to comply with the contract, by selling it to others or otherwise, an action commenced by the purchaser against the seller to compel execution of the deed and to obtain a decree for title upon such repudiation of the contract by the latter, before the time for the execution of the deed and delivery of possession, is premature.<sup>3</sup>

<sup>1</sup> *Warder v. Stilwell*, 3 Jur. (N. S.) 9, 26 L. J. Ch. 373.

<sup>2</sup> *Crosby v. Georgia Realty Co.*, 138 Ga. 746, 76 S. E. 38; citing *Ford v. Lawson*, 133 Ga. 237, 65 S. E. 444.

<sup>3</sup> *Crosby v. Georgia Realty Co.*, *supra*, citing *Barton v. New England Mortgage Co.*, (Miss.) 25 So. 362; distinguishing *Miller v. Jones*, 68 W. Va. 526, 71 S. E. 248, 36 L. R. A. (N. S.) 408, on the ground that in the *Miller* case it was sought to enforce certain provisions of the contract in regard to acceptance of payment of installments of purchase money and other charges, and did not seek to compel the seller to execute a deed, or to have title decreed to be in the purchaser before the time agreed upon for making deed.

See as to anticipatory breach, Sec. 702, note 4.

A promoter of a corporation, who, to induce a subscription, executed in January, 1908, an instrument reciting that he guaranteed specified dividends, and providing that, should the subscriber desire to sell the stock on or before April 12th, he would purchase it at par, and, should the subscriber thereafter desire to sell, the promoter would purchase for an additional price prior to October 20th, and declaring that the promoter reserved the right to terminate his obligations on written offer to buy the stock and tendering the money at the agreed price at any time on or before the expiration of two years from date of agreement, gave the promoter the right to terminate such of the obligations of the guaranty as had not been either performed or insisted on by the subscriber either at the time provided for their performance or at any later time before the exercise by the promoter of the option to buy, and where in October the subscriber demanded performance of the guaranty, and the promoter failed to perform, an action begun in April, 1909, on the guaranty, was not premature.<sup>4</sup>

#### SEC. 1252. STATUTE OF LIMITATIONS.—

In those states where the Statute of Limitations covers suits for specific performance, the suit for specific performance is barred upon the running of the statutory period.<sup>1</sup> But, in most states the period fixed by the statute is followed in cases of

<sup>4</sup> *McC Campbell v. Obear*, (Cal. App.) 148 P. 942.

<sup>1</sup> *Hargis v. Sewell's Adm'rs*, 87 Ky. 63, 7 S. W. 557, 9 Ky. L. Rep. 920; *Peters v. Delaplaine*, 49 N. Y. 362; *Hazzard v. Morrison*, (Tex. Civ. App.) 130 S. W. 244.

mere delay only.<sup>2</sup> Where, as shown in a preceding section, there are laches, as that term is understood in a court of equity, relief will be denied though the statutory period has not run.<sup>3</sup> And in those states where suits for specific performance do not expressly fall within any statutory limitation, courts of equity, by analogy, in cases of mere delay, follow the statute and deny relief where the suit is delayed beyond the period fixed for a corresponding legal action.<sup>4</sup>

The statute does not begin to run until the optionee is called upon to exercise his option. When, therefore, the option provides for a survey of the property and the duty of making the same is not expressly cast upon either party, a delay of three years before an attempt is made to fix the boundary line, by a survey, where no time is fixed by the option, and both parties acquiesce in the delay, is not a bar to the suit.<sup>5</sup>

A contract for the sale of corporation stock providing that at any time after six months, on notice of 90 days, the seller would repurchase the stock at the price paid, and, further, that the purchaser need not sell the stock at the price paid, contemplates there should be some delay; and where pro-

<sup>2</sup> Marsh v. Lott, 156 Cal. 643, 105 P. 968.

<sup>3</sup> Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516; Cocanaugher v. Green, 93 Ky. 519, 20 S. W. 542, 14 Ky. L. Rep. 507; Kline v. Vogel, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408.

<sup>4</sup> Castner v. Walrod, 83 Ill. 171, 25 Am. Rep. 369; Taylor v. Slater, 21 R. I. 104, 41 Atl. 1001.

<sup>5</sup> Calanchini v. Branstetter, 84 Cal. 249, 24 P. 149.

ceedings were set in motion by a demand that the seller repurchase, before the Statute of Limitations had run, and the actual demand was made a few months thereafter, there was no such laches as would bar an action therefor. The statute did not commence to run until a demand to purchase had been made.<sup>6</sup>

A sewing machine was leased for seventeen months with option of purchase at the end of that time. A cause of action for recovery of the machine accrued on the expiration of the option time and the Statute of Limitations did not begin to run until that time.<sup>7</sup>

SEC. 1253. EVIDENCE.—The burden of proof to show notice of timely election is on the optionee

<sup>6</sup> *Vickery v. Maier*, 164 Cal. 384, 129 P. 273.

In *Brooks v. Trustee Co.*, 76 Wash. 589, 136 P. 1152, it seems to be held that as to an action to recover the price paid for bonds with an option to return "at any time," the statute began to run as of the date of the contract, on the theory that the purchaser could not toll the statute indefinitely. It seems to us that when no time limit is expressly fixed, the rule should be that the statute begins to run upon the expiration of a reasonable time. No cause of action to recover the price arises till an election to return, and tender of the bonds or stock have been made, and since the purchaser has a reasonable time for these purposes, the statute can not be set in motion until either an election has been made or a reasonable time has elapsed. See *Heydrick v. Dickey*, 154 Ky. 475, 157 S. W. 915, 159 S. W. 666.

Case where A sold option owned by him to B and assigned to the latter a half interest in the consideration as being one-eighth of the profits on a sale of the property by the purchaser of the option when in fact the consideration was one-sixth, and B brought suit to recover his share of the difference, *Martin v. Stone*, 15 Cal. App. 174, 113 P. 706.

<sup>7</sup> *Standard Sewing Machine Co. v. Frame*, 2 Pennewill (Del.) 430, 48 Atl. 188.

and also to show performance on his part;<sup>1</sup> but the burden is on the signers to show that the option was not to be operative unless signed by themselves and another.<sup>2</sup> Under a "refusal" option to renew a lease, the burden of proof is on the optionee to prove that the offer of a third person was not *bona fide*;<sup>3</sup> and on plaintiff to show that the consideration is adequate,<sup>4</sup> and generally the burden is on plaintiff to show he is able, ready and willing to perform;<sup>5</sup> that a subsequent purchaser had notice,<sup>6</sup> and a mere preponderance of the evidence is not sufficient on which to grant specific performance of a contract,<sup>7</sup> and this is particularly true of an oral contract and part performance.<sup>8</sup>

Where the contract is oral, it must be clearly established;<sup>9</sup> and when within the Statute of Frauds, the part performance must be clearly made

1 Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Neill v. Hitchman, 201 Pa. 207, 50 Atl. 987; Hall v. Hyle, 136 N. Y. S. 887; Boldt v. Early, 33 Ind. App. 434, 70 N. E. 271, 104 A. S. R. 255.

2 Stanton v. Singleton, (Cal.) 54 P. 587.

3 Bettens v. Hoover, 12 Cal. App. 313, 107 P. 329.

4 Windsor v. Miner, 124 Cal. 492, 57 P. 386; *contra*, Finlen v. Heinze, 28 Mont. 548, 73 P. 123, holding burden is on party resisting the suit.

5 Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 A. S. R. 145.

6 Parmalee v. Kregelo, 143 Ind. 2, 42 N. E. 460.

7 Dewey v. Spring Valley L. Co., 98 Wis. 83, 73 N. W. 565.

8 Cutsinger v. Ballard, 115 Ind. 93, 17 N. E. 206; Hartwell v. Black, 48 Ill. 301.

Parol contract held too vague, etc., in terms, Grizzle v. Gaddis, 75 Ga. 350.

9 Cuppy v. Allen, 176 Ill. 162, 52 N. E. 61; Gibbs v. Whitwell, 164 Mo. 387, 64 S. W. 110; Wolfinger v. McFarland, 67 N. J. Eq. 687, 54 Atl. 862, affirmed; 60 Atl. 1119.

out;<sup>10</sup> when the contract is oral, reference may be had to a receipt given on payment of the price.<sup>11</sup>

A statement made by the secretary of the corporation with reference to the insertion of an option clause in the lease, is properly admitted against the corporation, the secretary having charge of the business and acting for the corporation in leasing and selling its lands.<sup>12</sup>

Where one elected to accept an option contract for the privilege of mining coal under land, binding him to explore and survey the coal deposits, he could not defeat a suit for specific performance on the ground that the enforcement thereof would work a manifest injustice, unless he showed, by a preponderance of the evidence, the absence of coal of workable quality and condition under the land, and, where the evidence was conflicting on the questions, the court properly enforced the contract.<sup>13</sup>

10 *Godschalek v. Fulmer*, 176 Ill. 64, 51 N. E. 852.

*Lewis v. North*, 62 Neb. 552, 87 N. W. 312, and the acts of part performance done with reference to and in pursuance of the oral contract.

Evidence held to establish parol agreement to lease certain land with option to purchase, there being part performance, *West v. Washington etc. R. R. Co.*, 49 Ore. 436, 90 P. 666.

11 *Krah v. Radcliffe*, 78 N. J. Eq. 305, 81 Atl. 1133, affirming 75 N. J. Eq. 109, 71 Atl. 404.

12 *Abbott v. 76 Land & Water Co.*, 87 Cal. 323, 25 P. 693.

13 *Green River Coal Min. Co. v. Brown*, 140 Ky. 332, 131 S. W. 13.

Sufficiency of evidence to sustain defense that the lessor signed the lease not knowing it contained an option, *Murphy v. Hussey*, 117 La. 390, 41 So. 692; *Thomas v. Gottlieb etc. Co.*, 102 Md. 417, 62 Atl. 633.

To sustain finding that lessor had not changed his position by reason of lessee's failure to give notice within time, *Monihon v. Wakelin*, 6 Ariz. 225, 56 P. 735.

SEC. 1254. DECREE.—It is proper practice to provide in the decree that plaintiff pay the price and interest to the clerk of the court for the use of defendant and that upon such payment being made, defendant execute a deed to plaintiff, and also to provide that in the event defendant fails to do so, the decree itself operate as such conveyance.<sup>1</sup>

Where a conveyance is taken by a third party from the optionor with notice of the option, the purchaser takes subject to the option and holds the property in trust for the optionee who may follow the land and compel the purchaser to convey,<sup>2</sup> and the bill may pray for specific performance, or, in the alternative for the purchase money which the purchaser agreed to pay, as the optionee may elect. But the decree for the money must be against the optionor and not against the purchaser. The money

<sup>13</sup> To show plaintiff had authority to sell the premises on the terms and in the manner described in the contract, *Womack v. Coleman*, 92 Minn. 328, 100 N. W. 9.

To sustain finding that the option was to be void if survey and abstract were not completed and price paid within a year, *Germer v. Gambill*, 140 Ky. 469, 131 S. W. 268.

To establish good faith of plaintiff, *Geo. Gunther Jr. Brew. Co. v. Brywezynski*, 107 Md. 696, 69 Atl. 514; *Washburn v. White*, 197 Mass. 540, 84 N. E. 106.

To sustain finding that option was modified by parol, *Murphy v. Anderson*, 128 Minn. 106, 150 N. W. 387.

Further as to evidence, see Sec. 1122.

<sup>1</sup> *Veith v. McMurtry*, 26 Neb. 341, 42 N. W. 6, 9.

<sup>2</sup> *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 110 A. S. R. 963, 67 L. R. A. 571; *Dengler v. Fowler*, 94 Neb. 621, 143 N. W. 944; but not where the optionee is estopped, *Milmoe v. Murphy*, 65 N. J. Eq. 767, 56 Atl. 292.

judgment may be made a lien on the land which may be ordered sold.<sup>3</sup>

<sup>3</sup> *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220.

Decree required plaintiff to pay street assessment, *King v. Raab*, 123 Iowa 632, 99 N. W. 306.

Decree allowed defendant to remove improvements, or in lieu thereof damages, *Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687.

Optionor on facts held not required to pay taxes, *Swanston v. Clark*, 153 Cal. 300, 95 P. 1117; optionor is liable for taxes accruing during time he resists specific performance, *Brewer v. Sowers*, 118 Md. 681, 86 Atl. 228.

Damages where timber cut, *McCowen v. Pew*, 147 Cal. 299, 81 P. 958, s. c. 153 Cal. 735.

Damages for use and occupation set off against contract price, *Gira v. Harris*, 14 S. D. 537, 86 N. W. 624.

Case where purchaser defendant took with notice of option and decree directed reimbursement to him of moneys paid out of plaintiff's money, *Chesbrough v. Vizard Inv. Co.*, 156 Ky. 149, 160 S. W. 725.

Abatement for outstanding option, *Obdert v. Marquet*, 163 Fed. 892.

Abatement for dower interest of wife, *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871.

Bond to cover cost of sewers instead of abatement of price, *Jersey City v. Flinn*, (N. J. Ch.) 78 Atl. 391.

An open, notorious and visible physical encumbrance on the optioned land gives no ground to the optionee for abatement in the price, *Wetherby v. Griswold*, (Ore.) 147 P. 388.



## CHAPTER XIII.

### APPENDIX OF FORMS.

- Sec. 1301. Author's statement.
- Sec. 1302. Assignment of option.
- Sec. 1303. Assignment by endorsement on option.

#### CAPITAL STOCK AND BONDS OF CORPORATIONS, OPTIONS ON.

- Sec. 1304. Option to purchase shares of capital stock of corporation, payment of part of price deferred.
- Sec. 1305. Option to purchase capital stock, assets, fixtures, good will, etc., of importing company.
- Sec. 1306. Option or "refusal" on capital stock at a price as low as any other *bona fide* offer.
- Sec. 1307. Option to seller to repurchase, giving him the first refusal.
- Sec. 1308. Clauses of agreement by vendor to repurchase shares at option of purchaser at purchase price and interest thereon, and notice of election thereunder.
- Sec. 1309. Option to purchaser to return bonds and receive back price paid.
- Sec. 1310. Option clause to majority of stockholders to appraise and purchase shares of stockholders becoming undesirable associates, etc.
- Sec. 1311. Option provisions of agreement to purchase shares of deceased stockholder.
- Sec. 1312. Option provisions of agreement among stockholders of corporation giving option to remaining or surviving stockholders to purchase shares of stockholders desiring to sell, or dying, with provision for valuation by appraisers to be appointed by the parties.
- Sec. 1313. Option by stockholders to sell their shares and interest in business of corporation to promotor of a consolidation.
- Sec. 1314. Provision of articles of incorporation giving the corporation the first refusal on shares of original subscribers desiring to sell.
- Sec. 1315. Agreement for sale and purchase of options in exchange for bonds of corporation to be organized, and on condition that the corporation shall be organized.

## CHATTEL MORTGAGE, OPTION CLAUSES IN.

- Sec. 1316. Chattel mortgage—Option to mortgagee to mature debt upon default by mortgagor in payment of principal or interest; if the mortgagee sells; or removes the chattels; or if any writ shall be levied; or if the mortgagee deems himself insecure.
- Sec. 1317. Chattel mortgage—Insecurity clause.
- Sec. 1318. Chattel mortgage—Insecurity clause. Another form.
- Sec. 1319. Chattel mortgage—Insecurity and interest clauses.
- Sec. 1320. Chattel mortgage—Insecurity, sale, and removal clauses.
- Sec. 1321. Chattel mortgage—Clause giving option to mortgagee to mature debt if mortgagor attempts to dispose of, or remove property.
- Sec. 1322. Chattel mortgage—Tax and assessment clause.

## LEASES, OPTION CLAUSES IN.

- Sec. 1323. Lease of land with option to purchase and provision as to improvements.
- Sec. 1324. Lease and option to lessee to purchase.
- Sec. 1325. Lease of land with option to purchase, with provision extending covenants to heirs, executors and administrators of the parties.
- Sec. 1326. Agreement to execute lease of land for ninety-nine years with option to lessee to purchase.
- Sec. 1327. Option in lease giving the lessee the right to purchase and also giving the lessor the right or option of repurchase on certain contingencies.
- Sec. 1328. Option clause in lease giving the lessor the right to take buildings of lessee, at a price to be fixed by three valuers, and if not taken the lease to be renewed for another term.
- Sec. 1329. Clause in lease requiring lessee to erect building and lessor "to take" the building at end of term, at its value to be determined by three appraisers, and further providing that if lessor shall elect to renew for a further term, the building erected shall belong to lessor.
- Sec. 1330. Agreement for lease with covenant by lessee to erect buildings and with option to lessor to extend lease in perpetuity, or to purchase the building at the appraised value, or to sell the lot to the lessee at the appraised value, with provisions for appraisement.
- Sec. 1331. Option in lease for extension upon notice, and option to lessee to purchase with provision as to rents.
- Sec. 1332. Option to lessee to extend lease.

- Sec. 1333. Lease with option to lessee to renew, with provision against second renewal.
- Sec. 1334. Option in, to renew annually for four successive years, with provision reserving the right to the lessor to sell the premises.

## MINING OPTIONS.

- Sec. 1335. Option on mineral rights in land.
- Sec. 1336. Option to purchase coal in certain land.
- Sec. 1337. Option to purchase fifty-one per cent of gold mining claim.
- Sec. 1338. Agreement to give option on capital stock to syndicate which agrees to do exploration work on mines.
- Sec. 1339. Oil and gas lease with option to lessee to surrender or terminate.
- Sec. 1340. Lease in form held mere option.

## MORTGAGES ON REAL ESTATE, OPTION IN.

- Sec. 1341. Clause in mortgage maturing debt, at option of mortgagee, for failure to pay principal or interest.
- Sec. 1342. Option to mortgagee to mature debt upon default by mortgagor in payment of principal or interest, in case of waste, failure to pay taxes, or to procure or renew insurance, etc.
- Sec. 1343. Option in note secured to accelerate maturity, upon default in payment of interest, taxes, etc.
- Sec. 1344. Notice of election to purchase. General form.

## OPTION ON REAL ESTATE. GENERAL FORM.

- Sec. 1345. General form of option to purchase real estate.
- Sec. 1346. Informal option on land.
- Sec. 1347. Offer to sell in form of letter.
- Sec. 1348. Option to purchase land with special stipulation to as to breach.
- Sec. 1349. Option on lands. General description of land.
- Sec. 1350. Option on farm and all property thereon except livestock.
- Sec. 1351. Option to purchase land with clause giving right to have deed made direct to purchaser from optionee, and providing for mortgage to secure deferred payments of price evidenced by note.
- Sec. 1352. Option on land taking form of deposit of deed of conveyance with bank.
- Sec. 1353. Option to purchase or to lease with permission for erection of building.
- Sec. 1354. Agreement to purchase fruit on trees, with option to purchase the land, improvements thereon, and water rights, part of price deferred and secured by mortgage.

- Sec. 1355.** Agreement by A to repurchase land conveyed by him to B in consideration for or in payment of shares of capital stock sold by B to A, the repurchase being at the option of B, with provision against assignment by B.
- Sec. 1356.** Option to purchase and agency to sell on commission the optionor binding himself to convey in penal sum with provision that if optionor fails to notify optionee, the option shall be renewed for one year.
- Sec. 1357.** Agreement combining option to purchase and agency to sell on commission.
- Sec. 1358.** Agreement held agency to sell and not option.
- Sec. 1359.** Option agreement for property to be taken over by proposed corporation.
- Sec. 1360.** Option to purchase land, the price payable in bonds of warehouse corporation, the issuance of which is to be authorized by Railroad Commission.
- Sec. 1361.** Option to purchase with provision against recording option but providing for deposit of it with third person, and upon failure to give notice of election, to be surrendered for cancellation.
- Sec. 1362.** Option clause requiring written notice of election and tender of price on delivery of deed of conveyance.

## MISCELLANEOUS.

- Sec. 1363.** Will, option in giving legatee right to purchase.

## SECTION 1301. AUTHOR'S STATEMENT.—

The following forms are given as helpful suggestions merely and only. The duty of a draftsman is to give legal form to the agreements of the parties. These agreements vary as the facts of particular cases vary. A general form must, therefore, be adapted to the particular case. However, there are certain common provisions and certain other essential provisions which a general form will necessarily suggest. For instance, the option contract must be drafted so as to show the parties and which party is optionor and which optionee. The property covered by the option must be described so it can be identified or located. The price must be certainly fixed, or the method of ascertaining it must be certainly and definitely pointed out. The time of making deferred payments should also be expressly provided for, and a full and careful description of any security for the price should be given, especially where it takes the form of a note secured by mortgage on the property.

Other provisions of the contract may be advisable but are not necessarily essential. Thus, the option may expressly require a fee simple title or provide for the payment of taxes and assessments, but in the absence of any express provision, the law writes into the option, a clause or clauses covering these matters.

There is no uniform custom as to acknowledgment of the option by the optionor and its certification by a notary public or other authorized officer. If it is desired to record the option, it must, of course, be acknowledged and certified in accordance with the laws of the particular state.

An option in a lease or in a mortgage, or other like instrument may depend upon the validity of the lease, or mortgage, or other contract, and, consequently, the lease, the mortgage, or the other contract, containing the option, should be executed in accordance with the local law.

The United States Internal Revenue Stamp Act, of 1898, did not require the stamping of an option contract, and the same rule undoubtedly applies to the present Stamp Act. (See Sec. 215, note 11.)

The forms presented in this appendix, except the general form, notice of election and assignment, have been taken from the decided cases and exhibit a variety of transactions. It was thought that forms taken from such sources would be more practical and, therefore, more useful than set forms.

#### SEC. 1302. FORMAL ASSIGNMENT OF OPTION.

*Know all men by these presents:* That I, C D of ....., the optionee named in that certain written option agreement, dated ....., 191., given by A B to me, and covering the following described property, to-wit:

(Here insert description of property.)

In consideration of \$. . . . ., lawful money of the United States, to me in hand paid, the receipt of which is hereby acknowledged, have sold and assigned, and do, by these presents, sell and assign, to the said G H, and to his heirs and assigns, the said option contract and all of my rights as optionee therein and thereunder, subject, nevertheless, to all the terms and conditions of said option contract.

WITNESS my hand this . . . . . day of ....., 191..

C D

(Acknowledged and certified, if desired.)

**SEC. 1303. ASSIGNMENT BY ENDORSEMENT ON OPTION.**

For value received, I hereby assign to G H the within option contract and all my rights thereunder.

Dated ....., 191..

(Signed) C D

**SEC. 1304. OPTION TO PURCHASE SHARES OF CAPITAL STOCK OF CORPORATION, PAYMENT OF PART OF PRICE DEFERRED.**

“San Jose, Cal., May 24, 1889. I hereby grant to J. C. Buttner or assigns five days' refusal to purchase 490 shares of Union Mill and Lumber Co. stock for the sum of \$15,100 on the following terms, to-wit, \$3,100 down on or before the 29th day of May, 1889, at 3 P. M.; \$1,000, payable every six months thereafter, with interest on the whole balance, payable every six months, and the said 490 shares as security, and 20 shares additional; making 510 shares in all. . . . Chas. C. Smith.”

**NOTE:** From *Buttner v. Smith*, (Cal.) 36 P. 652.

**SEC. 1305. OPTION TO PURCHASE CAPITAL STOCK, ASSETS, FIXTURES, GOOD WILL, ETC., OF IMPORTING COMPANY.**

“Seattle, Washington, October 30, 1909. For the consideration of one dollar in hand paid, the receipt whereof is acknowledged, J. N. Shaw hereby gives to E. H. Baker, for the space of time of thirty days, an option for the purchase of all the capital stock and assets of the Commercial Importing Company in the following manner: All merchandise of the Commercial Importing Company at invoice cost. All fixtures and machinery at 75 per cent of cost. All coffee urns at  $66\frac{2}{3}$  per cent of cost. And an option on any accounts receivable at 75 per cent of its face value. In addition said Baker shall pay five thousand dollars for the good will of said business of said Commercial Importing Company and said Shaw agrees that he will not carry on the coffee business in the state of Washington for the term of two years from date without the permission of said Baker. (Signed) J. N. Shaw. The foregoing

conditions are hereby accepted on this 30th day of October, 1909. (Signed) E. H. Baker."

NOTE: From *Baker v. Shaw*, 68 Wash. 99, 122 P. 611.

**SEC. 1306. OPTION OR "REFUSAL" ON CAPITAL STOCK AT A PRICE AS LOW AS ANY OTHER BONA FIDE OFFER.**

"Salt Lake City, Utah, October 5, 1907. This agreement, made and entered into between Horace H. Cummings and Barbara M. Cummings, his wife, first parties, and Christian Nielson and Sarah E. Nielson, his wife, second parties, all of Salt Lake City, Salt Lake County, Utah, witnesseth: That the said second parties hereby sell and convey to the first parties all their right, title and interest in the Cummings-Nielson Co. represented by 14 shares of the capital stock (one share of their original investment having been sold to James Nielson) and also to give an option on all their or either of their interest in the estate of Julian Moses, deceased, or refusal to purchase the same at a price as low as any other bona fide offer for it or any portion of it, for the sum of five hundred eighty [dollars] (\$580.00) cash, the receipt of which is hereby acknowledged, and four hundred thirty [dollars] (\$430.00) within six months from date hereof. The said second party shall also see that the ten shares of stock which is now held as security for certain payments to be made to Ruth Moses shall be liberated before the said second payment is made. In consideration of the transfer of stock and the fulfilling of the aforesaid covenants and conditions, the first parties agree to make the payments as aforesaid."

(Signature of parties.)

NOTE: From *Cummings v. Nielson*, 42 Utah 157, 129 P. 619.

**SEC. 1307. OPTION TO SELLER TO REPURCHASE, GIVING HIM THE FIRST REFUSAL.**

"This is to certify that I have this day bought of W. S. Witham five (5) shares of the capital stock of the Bank of Cartersville, Ga., and in consideration of the price paid, and for value received, I hereby agree not to sell all or any part of the stock at any time, until I have first offered the same



to W. S. Witham in writing at the book value of said stock, giving him ample time to accept or refuse the purchase, binding my heirs, executors, and administrators in the above option and agreement. J. C. Cothran. Witness, T. H. Willis."

NOTE: From Cothran v. Witham, 123 Ga. 190, 51 S. E. 285.

SEC. 1308. CLAUSES OF AGREEMENT BY VENDOR TO REPURCHASE SHARES AT OPTION OF PURCHASER AT PURCHASE PRICE AND INTEREST THEREON, AND NOTICE OF ELECTION THEREUNDER.

"The party of the second part hereby agrees to purchase thirty (30) shares of stock bearing a par value of \$3,000.00 and to pay two thousand two hundred and fifty (\$2,250.00) dollars on or before January 1, 1907, upon the proper delivery of the stock certificates, the company having been legally organized according to the laws of the state of Utah, and being ready for business.

"The parties of the first part, in consideration of the covenants and agreements of the party of the second part, hereby agree to guarantee said stock in this manner, namely, that they, the said parties of the first part, agree to purchase said thirty (30) shares of stock of the party of the second part four years after the date of the issue of said stock for the sum of two thousand two hundred and fifty (\$2,250.00) dollars, with interest thereon at eight per cent (8 per cent) per annum from the time of issue, at the option of the party of the second part."

NOTICE TO REPURCHASE.

"Gentlemen: It is my desire that you purchase, on the 23d day of January, 1911, 30 shares of stock of the Green River Fruit & Land Company for the sum of \$2,250.00, with interest, for four years at 8 per cent per annum, amounting to \$720.00 according to the terms of a certain contract dated the 11th day of September, 1906, between J. Moncrief, W. A. Cook, and D. D. Potter, of the first part, and A. M. Echter-nach, of the second part. By the terms of this contract you

have agreed to purchase this stock four years after its issue if I desired to sell. A. M. Echternach.”

NOTE: From *Echternach v. Monerief*, 94 Kan. 754, 147 P. 860.

#### SEC. 1309. OPTION TO PURCHASER TO RETURN BONDS AND RECEIVE BACK PRICE PAID.

“Seattle, May 24, 1906. Mrs. E. A. Brooks, City: In consideration of the purchase by you on this date of Inv. Bonds in our property No. 4, to the extent of one thousand fifty dollars (\$1,050), we hereby agree that after you have consulted your sister or any one else in regard to this investment you desire to withdraw your investment you may at any time return these bonds to our office and withdraw your entire investment with a 6 per cent earning per annum. The Trustee Co., per Wm. F. Howe, Trust Officer.”

NOTE: From *Brooks v. Trustee Co.*, 76 Wash. 589, 136 P. 1152.

#### SEC. 1310. OPTION CLAUSE TO MAJORITY OF STOCKHOLDERS TO APPRAISE AND PURCHASE SHARES OF STOCKHOLDERS BECOMING UNDESIRABLE ASSOCIATES, ETC.

“If in the opinion of the holders of the majority of the common stock of said corporation a holder of any common stock of said corporation should cease to be a desirable associate either on account of incompetency or personal conduct or if a holder of any common stock of said corporation shall voluntarily resign from his or her position, the holders of the majority of said common stock shall be at liberty and they are hereby empowered to appraise the cash value of said stock and redeem or purchase the same from said party, and said stock so purchased shall be divided or distributed among the holders of said common stock in proportion to the amounts of stock held by each.”

NOTE: From *Boggs v. Boggs & Buhl*, 217 Pa. 10, 66 Atl. 105. See also *Boswell v. Buhl*, 213 Pa. 450, 63 Atl. 56.

SEC. 1311. OPTION PROVISIONS OF AGREEMENT  
TO PURCHASE SHARES OF DECEASED STOCK-  
HOLDER.

“Third. In the event of Mr. Brown’s death, the remaining stockholders, parties to this agreement, shall have the right to purchase from his estate one-half of his stock within one year from date of his death, and the remaining within two years from said date, at a price equivalent to par and proportion of surplus as set forth in the first article of this agreement. Should the remaining parties hereto neglect or decline, within the respective periods aforesaid, as set forth in the second and third paragraphs of this agreement, to purchase said shares, then the representatives of the deceased may thereafter sell the same to any other person or persons, or, at their option, may at any time call upon the parties hereto to join with them in winding up, liquidating, and obtaining a dissolution of said corporation, which the parties hereto bind themselves to do, within six months after written notice to that effect.”

The first article of the agreement was as follows: “Should, for any reason, the said corporation at any time, by vote of its directors or otherwise, permanently dispense with the services of either of the parties hereto, the person whose services are thus dispensed with hereby binds himself to sell, and the remaining parties hereby agree to buy, within six months from the date of the vote of dismissal, the shares then owned by the retiring parties, at a price equivalent to the par value thereof, together with a fair valuation of the proportionate part of any surplus of earnings that may then be in the treasury, and to which said shares might equitably be entitled at the time of the payment for and the transfer of said shares.”

The second article of the agreement was as follows: “In the event of the death of either of the parties hereto (other than Mr. Brown), the remaining stockholders, parties to this agreement, shall have the right, at any time within six months from the date of such death, to purchase the stock of the deceased, at a price equivalent to the par value thereof,

together with the proportion of surplus as set forth in the first article of this agreement.”

NOTE: From *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648.

SEC. 1312. OPTION PROVISIONS OF AGREEMENT AMONG STOCKHOLDERS OF CORPORATION GIVING OPTION TO REMAINING OR SURVIVING STOCKHOLDERS TO PURCHASE SHARES OF STOCKHOLDERS DESIRING TO SELL, OR DYING, WITH PROVISIONS FOR VALUATION BY APPRAISERS TO BE APPOINTED BY THE PARTIES.

In 1895 James C. Lindsay, long engaged in the hardware business, being desirous of taking in with him some of his old employees, organized a corporation with a capital stock of \$150,000—\$100 per share—in which these employees were given certain shares on credit, or partly on credit; and in connection with this organization the parties entered into an agreement by which it was provided that:

“WHEREAS, the said parties have agreed among themselves that, owing to the nature of the business transacted by the said James C. Lindsay Hardware Company, it is not desirable that the said stock so owned and held by the parties hereto should go upon the market for sale and transfer, for the reason that all the present stockholders are active workers in the business of the said James C. Lindsay Hardware Company, and are giving their personal attention and time to the development of the business; and

“WHEREAS, by reason of the uncertainty of life and of the possibility of some one (or more) of the present stockholders, parties to this agreement, may wish to sell his interest in the said James C. Lindsay Hardware Company and retire therefrom, and to guard against the introduction as stockholders in the said James C. Lindsay Hardware Company of strangers or outsiders in the said business, whether by reason of a wish to sell the said stock or by reason of the death of any one or more of the present stockholders, now this agreement is made:

“The parties hereto, owning at present all the stock of the said company, agree among and with each other that in case any one or more of them should desire to sell his stock in the

said James C. Lindsay Hardware Company, and retire from said business, or in the event of the death of any one (or more) of the present stockholders, it is agreed that those of the present stockholders, who remain in the said business as stockholders therein shall have the option to purchase and acquire the whole of the stock interest of such party so dying or so desiring to sell his said interest at the book value thereof, which book value shall be ascertained as follows:

“In case the parties can agree upon a price to be paid, then the parties having the right to purchase may take the interest at such price so agreed upon. But in case the representatives of the party so dying or the party desiring to retire by sale of his interest and the remaining parties of this contract can not agree upon a fair price or book value thereof, then each of the parties shall have the right to appoint one experienced business man as arbitrators, who, if they can agree, shall fix a price, whereupon the parties to this contract remaining in the business shall have the right to purchase said interest of the said party going out, at such figure, if they so desire; but they shall have the option to refuse or to take the interest at that price.

“In the event that the two arbitrators so appointed can not agree, then they shall choose a third party as umpire, and the decision of the majority thereof shall fix a price at which the parties remaining in the business shall have the right to take or to refuse the interest at the price so determined. In case the parties remaining in the business refuse to purchase after the price is fixed by arbitrators, then the interest may be sold by the owner or his representative to the highest and best bidder.

“Any stock of a party retiring from the business, or dying, acquired by the remaining stockholders under this agreement shall be divided or assigned by the president of the board of directors at such time acting, subject to the approval of the board, to any one or more of the parties to this agreement, or to some other party not in this agreement, on the payment by such party of the amount of the purchase price thereof, which shall be divided among such parties as shall have supplied the purchase money to pay for the interest so retiring.”

NOTE: From *In re Lindsay's Estate*, 210 Pa. 224, 59 Atl. 1074.

SEC. 1313. OPTION BY STOCKHOLDERS TO SELL THEIR SHARES AND INTEREST IN BUSINESS OF CORPORATION TO A PROMOTOR OF A CONSOLIDATION.

THIS AGREEMENT, Entered into this .... day of ....., A. D. 19..., by and between the undersigned owners and holders of property, or shares of capital stock or interest in ..... Brick Company, hereinafter called the "Vendors," parties of the first part, and ....., hereinafter called the "Consolidation Purchaser," party of the second part, WITNESSETH:

WHEREAS, The "Consolidation Purchaser" desires to obtain the right to purchase and acquire for, or to have purchased and acquired by, a corporation hereinafter to be designated by him and hereinafter known as "Brick Company," the property hereinafter described, and

WHEREAS, The "Vendors" are the owners of, and are willing to sell to the "Consolidation Purchaser," the property hereinafter described,

NOW, WHEREFORE, In consideration of the work and services performed in the promotion of a consolidation of the fire brick manufacturers of the State of Pennsylvania by the said "Consolidation Purchaser," and in further consideration of the action to be taken by the "Consolidation Purchaser," herein, and of one thousand dollars (\$1,000) to the "Vendors" by him paid (the receipt of which is acknowledged), the "Vendors" hereby covenant and agree with the "Consolidation Purchaser" as follows:

Article I: The "Vendors" if, and when, so requested by the "Consolidation Purchaser," at any time before ....., 19..., will sell, convey, assign, transfer and deliver unto the "Consolidation Purchaser," his heirs, executors, administrators, survivors or assigns, by good and indefeasible title, and free and clear of all incumbrances and all indebtedness and liabilities (except such as are specifically stated in "Schedule A," hereto annexed and made a part thereof), all their, and each of their, property, shares of capital stock of, and interest in said ..... Brick Company to the extent set opposite their respective signatures, and upon and subject to the terms hereinafter provided: A general but not exclusive schedule

of the assets and property of the ..... Brick Company being hereto annexed and made a part hereof, marked "Schedule B."

Article II: The purchase price of the property acquired by Article I shall be three hundred thousand dollars (\$300,000), and the one thousand [dollars] (\$1,000) paid as part consideration for this contract shall be applied on account thereof.

Article III: If, and in case, the "Consolidation Purchaser" shall elect to purchase said property, property interests and shares of capital stock, payment at the price aforesaid shall be made wholly in cash, or at the option of the "Vendors" one hundred and fifty thousand dollars (\$150,000) in cash, and the remainder thereof in the preferred and common stocks of the "Brick Company" under the terms and conditions set forth in the exhibit hereto annexed and made a part hereof as "Vendors' Underwriting Proposition."

Article IV: The "Vendors" will allow the appraisers, accountants, attorneys and agents of the "Consolidation Purchaser" full access to, and examination of, all the property, books, inventories, records, titles, corporate status and affairs of their said business covering a period not exceeding three years last past, and will likewise make and submit forthwith to such appraisers and accountants full and true inventories, balance sheets, profit and loss income statements, and other financial or manufacturing statements of any kind, and upon demand will furnish maps, complete abstracts of title, and other data which said appraisers, accountants and attorneys may deem necessary.

Article V: In consideration of the execution of this agreement by the "Consolidation Purchaser," and by the "Vendors" severally, and in the event of the purchase of, and payment for, said property upon the terms of this agreement, and in further consideration of such purchase and payment, the "Vendors" severally and expressly covenant and agree with the "Consolidation Purchaser," his heirs, executors, administrators, survivors or assigns that they will not, directly or indirectly, individually or as officers, directors or agents of any corporation, firm or individual, engage or be interested in the business of manufacturing, buying, selling or dealing

in silica or clay fire brick in the States of .....  
....., .....**or**.....,  
for a period of fifteen years from and after the date of such purchase and payment, except with the consent, or in the employment of the said "Brick Company" or the parties to whom this contract may be assigned by the "Consolidation Purchaser," it being understood and agreed that the "Vendors'" good will is one of the essential considerations for the execution of this contract by the "Consolidation Purchaser." They are, however, in no way restricted in the manufacture of Magnesite brick or dealing in magnesite, or any article made in whole or in part from magnesite.

Article VI: The "Consolidation Purchaser" shall have, and hereby there is vested in him, the right to assign, transfer, and set over to such banker or bankers, or other party as shall be nominated by such "Consolidation Purchaser," any or all of his rights under and in this agreement, and thereupon such assignee (provided that such assignment be by written instrument accepted by such assignee, and not otherwise) shall be subrogated to, and shall have all the rights and interests, and shall assume all the liabilities, which are vested in or attached to the said "Consolidation Purchaser" and which may be so assigned, and upon such accepted assignment the "Consolidation Purchaser," *ipso facto* shall be fully released and discharged from all liability, obligations, or responsibility, if any there be, under this agreement.

Article VII: The "Consolidation Purchaser" will cause to be made promptly an audit, examination and appraisement of the property covered by this contract, and will thereafter, and on or before the ..... day of ....., 19..., give notice in writing to the "Vendors" by a communication addressed to the ..... Brick Company, at ....., ....., of his election to avail of this option, and such notice shall be accompanied by a statement showing the proposed total issue of bonds and preferred and common stock of the "Brick Company," and also the aggregate net earnings for the past two years of the concerns being purchased by it.

No mistake, error or variation from the final figures, in such statement of securities to be issued, or aggregate net



earnings, however, shall avoid the right of the "Consolidation Purchaser" to purchase the property of the "Vendors" for cash at the purchase price herein.

Article VIII: The "Vendors" will within ten days after the receipt of the notice and statement mentioned in Article VII (during which period they shall have the right to investigate the accuracy of the figures in said statement) notify the "Consolidation Purchaser" of their intention to exercise the option given them by Article III to take the remainder of their purchase price in stock according to the terms thereof and the exhibit thereto, and thenceforth they will be bound thereby.

Article IX: The "Vendors" certify that "Schedule C," hereto annexed and made a part hereof, correctly states for the periods therein set forth:

1st. The amount of goods sold by them.

2nd. The gross earnings.

3rd. The net earnings.

4th. The amount of interest paid for borrowed money.

5th. The amount paid for salaries of President, Vice President, Secretary, Treasurer and General Manager.

Article X: To facilitate purchase and payment hereunder the "Vendors" when called upon so to do by the "Consolidation Purchaser" will deposit with the ..... Trust Company of ....., the certificates for the shares so owned or controlled by them respectively, duly assigned in blank, and their proper conveyances of, and abstracts of title respecting, the property covered by this agreement, and will cause said certificates or other property to be delivered by said Trust Company to the said "Consolidation Purchaser," his heirs, executors, administrators, survivors or assigns, upon payment being made therefor as herein provided. In the event that this agreement be not so consummated, then and thereupon such certificates, conveyances, abstracts, and other property shall be returned to the "Vendors" respectively so depositing the same, without expense of any kind. In evidence of such deposits hereunder, the Trust Company shall issue and deliver to the "Vendors" its proper receipt. All payments and deliveries provided for by this agreement shall be made at the office of said Trust

Company; and the "Vendors" agree that, during the period covered by this contract, no increase in its capital stock, and no bond, mortgage, lease or conveyance upon or in respect of its real estate or plant, or any of its property, shall be made, and that allowance shall be made to the "Consolidation Purchaser" for any dividends paid, or any distribution of surplus profits or earnings after the date hereof.

Article XI: At the time of transfer hereunder, upon request, the "Vendors" will procure for the "Consolidation Purchaser," or his assigns, the resignation in writing of all its directors and officers.

Article XII: The parties hereto severally and respectively will make, execute, acknowledge and deliver in due form of law, all such conveyances or other instruments, and will do all such acts and things as reasonably may be required, the one from the other, to fully carry out the purposes of this agreement.

IN WITNESS WHEREOF the said parties have hereunto set their hands and seals the day and year first above written.

(Signed) ..... Brick Company,

By.....  
President.

Attest:

.....  
Secretary.

NAME.	NO. OF SHARES.
.....	.....
.....	.....

(Schedules should be attached.)

VENDORS' UNDERWRITING PROPOSITION.

The "Consolidation Purchaser" will endeavor to observe like rules of valuation in purchase of all properties.

For the aggregate purchase price of all the concerns as set forth in Article II in each "Vendor's Agreement," the "Brick Company" will issue, or cause to be issued, under its guaranty five per cent bonds (first mortgage, debenture, or collateral trust, and in one or several series, at its option) in an amount not to exceed thirty-three and one-third (33 1-3) per cent of such aggregate purchase price and six (6) per cent

cumulative preferred stock for the remainder of such aggregate purchase price.

Each of the "Vendors" taking a part of their purchase price in the preferred and common stock of the "Brick Company" under Article III of "Vendor's Agreement" (there called "The remainder") will receive such part or remainder of purchase price in the six (6) per cent cumulative preferred stock of the "Brick Company," at par, and in addition thereto and as a bonus herewith, will be paid fifty (50) per cent thereof in the common stock of the "Brick Company" at par.

The "Vendors" (taking part or the remainder of their purchase price in stock under Article II) will be paid a further amount of common stock (providing their earnings justify it) in the following manner:

The average net earnings of the "Vendors" for the past two years shall be ascertained and the auditors' estimate of earnings upon new plants erected or acquired within these two years, whose earnings would not otherwise receive credit, shall be added thereto.

The ratio that the part or remainder of purchase price (that the "Vendors" take in stock) bears to the total purchase price shall be ascertained and such rate shall be applied to such average net earnings, and there shall be deducted from the result thereof an amount equal to six (6) per cent of the "Vendors" preferred stock (payable thereon) and common stock shall be paid to the "Vendors" on the remainder of such proportion of said earnings on the basis of what would have been four (4) per cent, except for the issue for good will hereinbefore provided for.

NOTE: From Harbison-Walker Refractories Co. v. Stanton, 227 Pa. 55, 75 Atl. 988.

#### SEC. 1314. PROVISION OF ARTICLES OF INCORPORATION GIVING THE CORPORATION THE FIRST REFUSAL ON SHARES OF ORIGINAL SUBSCRIBERS DESIRING TO SELL.

"If at any time any of the original stockholder subscribers hereto desire to sell and dispose of their stock, said stockholder or stockholders shall first offer it in writing to the board of

directors, stating price and terms and give the board of directors ten days in which to place it with the stockholders. At the expiration of ten days if no stockholder has purchased and settled for same, said stockholder or stockholders shall have the right to sell to whomever will purchase upon the same [terms] and price for which it was offered to the board of directors.”

NOTE: Held valid in *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 149 N. W. 754.

SEC. 1315. AGREEMENT FOR SALE AND PURCHASE OF OPTIONS IN EXCHANGE FOR BONDS OF CORPORATION TO BE ORGANIZED AND ON CONDITION THAT THE CORPORATION SHALL BE ORGANIZED.

AUGUSTA, GA., June 1, 1900.

“In consideration of five thousand dollars in cash, represented by draft of W. H. Chew, trustee of G. E. Fisher, of 37 Wall Street, New York, for \$5,000.00, and the agreement of said trustee to have delivered to me fifteen thousand dollars of bonds as hereinafter stated, total consideration twenty thousand dollars, I, Thomas Barrett, Jr., hereby agree to sell to said trustee all options owned by me and expiring May 1st, 1901, for the purchase of land fronting on the Savannah River, which stand in my name, and which are of record in Edgefield County, S. C., and Lincoln County, Ga., to which reference is made.

“This sale is upon the condition that said trustee and said G. E. Fisher and his associates, shall proceed to organize an incorporation to develop a water power of not less than 15,000 horse-power, at or near Ring Jaw Shoals, on the Savannah River, within the space of eight (8) months from this date, and, upon the completion of said incorporation to deliver me first mortgage bonds of the corporation for fifteen thousand dollars (\$15,000) ; said corporation not to issue bonds in excess of 80 per cent of the amount paid, laid out and expended in the purchase of the various tracts of land and the land covered by these options, and in the development of said water power, or that said trustee and said G. E. Fisher and his associates

shall have the privilege of paying to me \$15,000.00 in cash instead of bonds.

“It is distinctly understood that if said draft for five thousand dollars is not paid on presentation, then this instrument is absolutely null and void, and, that if said money is paid and the corporation is not organized and the bonds hereinbefore specified, issued and delivered to me by January 1st, 1901, or fifteen thousand dollars cash paid in lieu thereof, time being of the essence of the contract, then this sale shall be null and void, and the sum of five thousand dollars paid to me at this time shall not be accounted for by me, but shall be retained by me as the amount of liquidated damages agreed upon between the parties hereto for a violation of the said contract, and all options to be returned to me the same as if this sale had not been made.

“W. H. CHEW, Trustee.

“THOMAS BARRETT, JR.”

NOTE: From *Twin City Co. v. Barrett*, 126 Fed. 302, 61 C. C. A. 288.

SEC. 1316. CHATTEL MORTGAGE — OPTION TO MORTGAGEE TO MATURE DEBT UPON DEFAULT BY MORTGAGOR IN PAYMENT OF PRINCIPAL AND INTEREST, IF THE MORTGAGOR SELLS, OR REMOVES THE CHATTELS, OR IF ANY WRIT SHALL BE LEVIED, OR IF THE MORTGAGEE DEEMS HIMSELF INSECURE.

“And the said mortgagor hereby covenants and agrees that in case default shall be made in the payment of the note ..... aforesaid, or of any part thereof, or the interest thereon, on the day or days respectively on which the same shall become due and payable, or if the mortgagee ..... executors, administrators or assigns, shall feel ..... insecure or unsafe, or shall fear diminution, removal, or waste of said property; or if the mortgagor shall sell or assign, or attempt to sell or assign, the said goods and chattels, or any interest therein; or if any writ, or any distress warrant, shall be levied on said goods and chattels, or any part thereof; then, and in any or either of the aforesaid cases, all of said note ..... and sum of money, both principal and interest, shall, at the option of the said mortgagee ..... execu-

tors, administrators or assigns, become at once due and payable, and the said mortgagee . . . . . executors, administrators or assigns or any of them, shall thereupon have the right to take immediate possession of said property, and for that purpose, may pursue the same wherever it may be found, and may enter any of the premises of the mortgagor with or without force or process of law, wherever the said goods and chattels may be, or be supposed to be, and search for the same, and if found, to take possession of, and remove, and sell, and dispose of the said property, or any part thereof," etc.

#### SEC. 1317. CHATTEL MORTGAGE — INSECURITY CLAUSE.

"If the said party of the second part (mortgagee) shall at any time consider the possession of said property, or any part thereof, essential to the security of the payment of said promissory note, then, in such event, the said party of the second part, his agent or attorney, executors, administrators, or assigns, shall have the right to the immediate possession of said described property, and the whole or any part thereof; and shall have the right, at his option, to take and recover such possession from any person or persons having or claiming the same, with or without suit or process, and for that purpose may enter upon any premises where said property, or any part thereof, may be found."

NOTE: From *Clark v. Baker*, 6 Mont. 153, 9 P. 911. See also *Richardson v. Coffman*, 87 Iowa 121, 54 N. W. 356.

#### SEC. 1318. CHATTEL MORTGAGE — INSECURITY CLAUSE. ANOTHER FORM.

"And in case the said Elizabeth Graham, (mortgagee) or her attorney, shall at any time deem herself insecure, it shall be lawful for her, or her attorney, to take possession of said property, and sell the same at public or private sale, as aforesaid."

NOTE: From *Evans v. Graham*, 50 Wis. 450, 7 N. W. 380.

SEC. 1319. CHATTEL MORTGAGE — INSECURITY AND INTEREST CLAUSES.

“But in case default shall be made in the payment of any of said notes, or in the interest thereon, or any part thereof at the time above limited for the payment of the same, or if the said party of the second part shall, at any time, deem itself insecure, it shall be lawful for the said party of the second part, its successors or assigns, or its authorized agent, to enter upon the premises of said parties of the first part, or any part thereof, as may be, and take possession thereof, and remove the same to any place within the state of . . . . ., and to sell and dispose of the same,” etc.

NOTE: From *Woods v. Gaar, Scott & Co.*, 93 Mich. 143, 53 N. W. 14.

SEC. 1320. CHATTEL MORTGAGE — INSECURITY, SALE, AND REMOVAL CLAUSES.

“The said John H. Cole is hereby authorized, at any time when he shall deem himself insecure, or if the said parties of the first part shall sell, assign, or dispose of, or attempt to sell, assign, or dispose of, the whole or any part of the said goods and chattels, or remove, or attempt to remove, the whole or any part thereof from the said township of Sparta, without the written assent of the party of the second part, then and from henceforth it shall and may be lawful for the said party of the second part, his executors, administrators, or assigns, of his, her, or their authorized agent, to enter upon the premises of the said party of the first part, or any place or places where the said goods or chattels, or any part thereof, may be, and take possession thereof, and dispose of the same in the manner above specified.”

NOTE: From *Cole v. Shaw*, 103 Mich. 505, 61 N. W. 869.

SEC. 1321. CHATTEL MORTGAGE—CLAUSE GIVING OPTION TO MORTGAGEE TO MATURE DEBT IF MORTGAGOR ATTEMPTS TO DISPOSE OF, OR REMOVE PROPERTY.

“And I, the said Lewis Wells, (mortgagor) do hereby covenant and agree to and with the said D. N. Wells, (mortgagee) that in case of default made in the payment of the above-men-

tioned promissory note, or in case of my attempting to dispose of or remove from said county of Polk the aforesaid goods and chattels, or any part thereof, or whenever the said mortgagee shall choose so to do, then and in that case it shall be lawful for said mortgagee or his assigns, by himself or agent, to take immediate possession of said goods and chattels, wherever found, the possession of these presents being sufficient authority therefor, and to sell the same at public auction, or so much thereof as shall be sufficient to pay the amount due, or to become due, as the case may be, with all reasonable costs pertaining to the taking, keeping, advertising and selling of said property.”

NOTE: From *Wells v. Chapman*, 59 Iowa 658, 13 N. W. 841.

#### SEC. 1322. CHATTEL MORTGAGE—TAX AND ASSESSMENT CLAUSE.

“And it is hereby covenanted and agreed, in further consideration of the premises, that . . . . . upon default in the payment of any taxes or other assessments, or default in the payment of any debt or obligation which may become a lien upon the said property hereby mortgaged, that from henceforth it shall and may be lawful for the parties of the second part (mortgagees), . . . . . at their option, to declare the whole remaining indebtedness then unpaid to be due and payable at once, and to grant, bargain, sell, and dispose of said before-mentioned property and all benefit and equity of redemption of said party of the first part, according to the laws of . . . . ., paying to the said party of the first part (mortgagor) the overplus of the purchase money to be obtained therefor after the satisfaction of the principal and interest due on said debt aforesaid, the costs of advertising and sale, and costs of foreclosing, with attorney’s fees and commissions to be due on said foreclosure and the collection of said debt.”

NOTE: From *Jones v. Norton*, 136 Ga. 835, 72 S. E. 337.

#### SEC. 1323. LEASE OF LAND WITH OPTION TO PURCHASE, AND PROVISION AS TO IMPROVEMENTS.

“Article of agreement made and entered into this twenty-first day of February, 1880, between Simeon B. Bell, of the



first part, and T. W. Wright, of the second part: Witnesseth, that the said Simeon B. Bell, of the first part, rents, leases, and bargains to the party of the second part a certain tract of land described and bounded as follows, namely:

(Description of property.)

“To have and to hold said land for stock, fruit, and gardening purposes for a period of ten years from this date. The gas-well is included in said lease.

“In consideration of which, the party of the second part agrees to pay to said Bell the sum of thirty dollars per year; the sum of seven dollars and fifty cents quarterly in advance; to pay all lawful taxes on said land when due; to fence said land with a good five-board fence, except along the Rosedale road; and to maintain and keep in repair all of said fence while in possession. And it is further agreed by these parties that this lease is transferable, and that all buildings erected on said land may be removed, unless the parties in interest can agree on the purchase and sale of the same; but that all shade-trees, and fruit-trees, bushes, small fruit, shrubs, vineyards, and berry-plants shall be preserved, and fences also shall be left and remain on said premises as part of the same; and further, that if the above stipulations are not fulfilled and complied with, such failure at any time renders this lease void, and the property reverts to the original owner. Further, the said Simeon B. Bell agrees to take three hundred and fifty dollars (\$350) per acre for said land if purchased and paid for within two years. Said lease to take effect March 1, 1880.

“In witness whereof we have hereunto set our hands and seals this twenty-first day of February, 1880.

SIMEON B. BELL,  
T. W. WRIGHT.”

(Acknowledged and certified if desired.)

NOTE: From Bell v. Wright, 31 Kan. 236, 1 P. 595.

## SEC. 1324. LEASE AND OPTION TO LESSEE TO PURCHASE.

“This indenture made this 24th day of November, 1899, wherein Mrs. C. Anderson is party of the first part, and Lewis Anderson party of the second part, wherein the party of the

first part leases to the party of the second part the (76 acres) seventy-six acres located in S. W.  $\frac{1}{4}$  of sec. 15, Adams township, for the term of ten years (10 yrs.). The party of the second part agrees to pay rent to the amount of \$300 per annum as follows: \$150 October 1, 1900, and \$150 March 1, 1910, each year thereafter at the same time and rate. The party of the first part further agrees to sell to the party of the second part at any time if the party of the second part so desires, at the sum of eighty-five [dollars] (\$85) per acre. Party of the second part also agrees to haul out manure on said land and to farm same in a workmanlike manner.

(SEAL)

MRS. C. ANDERSON.  
LEWIS ANDERSON."

NOTE: From *Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265, Ann. Cas. 1912C, 556.

SEC. 1325. LEASE OF LAND WITH OPTION TO PURCHASE, WITH PROVISION EXTENDING COVENANTS TO HEIRS, EXECUTORS AND ADMINISTRATORS OF THE PARTIES.

"Know all men by these presents that I, Horace L. Sage, of the county of Marshall and state of Kansas, for and in consideration of the covenants of Charles Bras, hereinafter set forth, do by these presents lease unto the said Charles Bras, of the county of Marshall and state of Kansas, the following described property, to wit: Southeast quarter of section fifteen, township three south, of range seven east; to have and to hold the same for a period of five years from this date, February 5th, A. D. 1883, provided said lessee shall pay the rental for said premises as hereinafter set forth at the time when the said payments become due, and keep the property fully insured against losses by fire, wind, and lightning; and the said Charles Bras agrees to pay the said Horace L. Sage one hundred and forty-four dollars annually at the expiration of each year, and to pay all taxes which may be levied on said lands when the same become due, as rent. The said Charles Bras further covenants with the said Horace L. Sage that at the expiration of the time mentioned in this lease peaceable possession [of said premises] shall be given to said lessor [and] in as good condition as they now are, the usual wear excepted; and that,

upon the nonpayment of the whole or any portion [of the rent] to be paid, the said lessor may, at his election, either distrain [for] said rent due, or declare this lease at an end, and recover possession as if the same was held by forcible detainer; the said lessee hereby waiving any notice of such election, or any demand for the possession of said premises. And it is further covenanted and agreed by the said parties that the said Charles Bras shall have the right to purchase said premises, if he so elect, at the stipulated sum of twelve hundred dollars, at the expiration of this lease; and if the said lessee elect to purchase, as above set forth, to make a good and sufficient title, warranting to said purchaser said premises, except taxes and tax titles. The covenants herein shall extend to and be binding upon the heirs, executors, and administrators of the parties to this lease. Witness the hands and seals of the parties aforesaid, this fifth day of February, A. D. 1883. Horace L. Sage, Charles E. Bras.”

NOTE: From *Bras v. Sheffield*, 49 Kan. 702, 31 P. 306, 33 A. S. R. 386.

SEC. 1326. AGREEMENT TO EXECUTE LEASE OF LAND FOR NINETY-NINE YEARS WITH OPTION TO LESSEE TO PURCHASE.

“Received of Franklin E. Bushman the sum of \$250, which is hereby acknowledged, to apply upon the first six months’ rental of the property known as lots 37, 38, 39 and 40 of block 85 of Governor and Judges’ Plan, situated in the city of Detroit, county of Wayne and state of Michigan, consisting of 160 feet on the south side of Columbia Street West, between Woodward and Park street. The balance, \$1250, to be paid on or before sixty days from the date hereof, abstract to be brought down showing good, merchantable title. It is understood that the said John J. Faltis is to execute a lease on the above described premises to Frank E. Bushman, or any corporation to be incorporated for a period of ninety-nine years, from and after the first day of August, 1913, the rental for the period of said term to be as follows: \$3000 per year net, for three years, free of all taxes and assessments that may be levied against the above property. For the balance, ninety-six years, the rental shall be \$4000 per year net, free of all taxes

and assessments. It is understood and agreed that the said John J. Faltis agrees to sell to the said lessee, on or before ten years from the execution of the above lease, the property described herein, for the sum of \$100,000. It is understood and agreed upon that there shall be no restrictions as to the kind or class of buildings that the said lessee may desire to erect and that he may have the privilege of subletting the above premises. We hereby set our hand and seal this twenty-fourth day of July, 1913.

JOHN J. FALTIS."

NOTE: From *Bushman v. Faltis*, (Mich.) 150 N. W. 848.

SEC. 1327. OPTION IN LEASE GIVING THE LESSEE THE RIGHT TO PURCHASE AND ALSO GIVING THE LESSOR THE RIGHT OR OPTION OF REPURCHASE ON CERTAIN CONTINGENCIES.

"At the expiration of this lease, or upon the sale of said property by said Bacon, or, in case of his death, the said company, by their authorized agent, shall have the right to purchase the said land now leased for the sum of one hundred dollars per acre, payment to be in cash at the time the deed is made and the land taken by said company. If, after purchase, the company shall decide to discontinue using said lots for stock purposes, the said Bacon or his heirs shall have the refusal to repurchase the same at the same price per acre for the land, and to pay for all improvements that may be put on said land, including the fencing, provided they agree to do so within ninety days after the same shall be offered to them."

NOTE: From *Bacon v. Kentucky Cent. Ry. Co.*, 95 Ky. 373, 25 S. W. 747, 16 Ky. L. Rep. 77.

SEC. 1328. CLAUSE IN LEASE GIVING THE LESSOR THE RIGHT TO TAKE BUILDINGS OF LESSEE AT A PRICE TO BE FIXED BY THREE VALUERS, AND IF NOT TAKEN, THE LEASE TO BE RENEWED FOR ANOTHER TERM.

"And it is further covenanted by and between the parties hereto that at the expiration of said term of five years the parties of the first part, their executors, administrators, or assigns, shall have the right, in their election, to purchase and

take of and from the party of the second part, his executors, administrators, or assigns, the buildings erected by him or them, or being on said premises, at a valuation thereof, not to exceed \$10,000, to be made by three disinterested persons, to be chosen in the usual manner, and upon such purchase to re-enter upon said premises, and the same to have again as in their former estate and right. And if the parties of the first part, their executors, administrators, or assigns, elect not to make such purchase, then this lease, at the then rental value of the premises, to be determined by a reference, in the manner above set forth, shall stand continued for another term of five years. And in like manner, at every succeeding term of five years, the same election as above reserved by the parties of the first part, their executors, administrators, or assigns, shall be had; and if the buildings and improvements, as above limited, are not purchased and taken, then this lease, at the then rental value, to be determined as above described, and upon the other terms and conditions above set forth, shall stand continued for another term of five years. And then the buildings and improvements placed or made upon said premises shall remain thereon as a security for the execution of the covenants herein contained, on the part of the said party of the second part, unless said lessors, or some persons authorized thereto, shall consent in writing to the removal of the same, or any part thereof: Provided, always, and these presents are upon this condition, that if it shall happen that the rent hereby reserved, or any part thereof, shall be behind and unpaid after the same ought to be paid according to the reservation thereof, or if the party of the second part, his executors, administrators, or assigns, shall not well and truly observe, keep, and perform all and singular the covenants, conditions, and agreements herein contained, on his and their part to be observed, kept, and performed, according to the true intent and meaning thereof, then, and in any of the said cases, immediately upon the happening thereof, this lease, and everything herein contained, on the part of the parties of the first part, henceforth to be done and performed, shall cease, determine, and be utterly void, anything herein contained to the contrary notwithstanding."

NOTE: From *Brush v. Beecher, et al.*, 110 Mich. 597, 68 N. W. 421.

43—Option Contracts.

SEC. 1329. CLAUSE IN LEASE REQUIRING LESSEE TO ERECT BUILDING AND LESSOR "TO TAKE" THE BUILDING AT END OF TERM, AT ITS VALUE TO BE DETERMINED BY THREE APPRAISERS, AND FURTHER PROVIDING THAT IF LESSOR SHALL ELECT TO RENEW FOR A FURTHER TERM, THE BUILDING ERECTED SHALL BELONG TO LESSOR.

"Said second party (lessee) is hereby permitted and agrees to erect a building to reasonably occupy the space between the buildings now on said property and the new Wayne County Savings Bank, to cost not to exceed five thousand dollars, (\$5,000) and to be of equal height with the building now on said corner. Said first party (lessor) agrees to take said building to be erected so as aforesaid by said second party, at its value at the termination of said five years, said value to be determined by three appraisers, to be chosen in the usual way; but the appraisal to be made by them shall be upon the basis of the cost of said building, not to exceed five thousand dollars when finished, and any deterioration by wear, breakage, or faulty construction to be deducted therefrom; but if such building shall not be worth cost, less such deterioration, then it shall be appraised at its then actual cash value. In case, however, said first party shall elect at the termination of said five years to renew this lease for a further term of five years, upon the same terms above stipulated, she shall be entitled, at the end of said second term, to said building so to be erected as aforesaid, and to receive from said second party, free of any charge or claim, a bill of sale thereof. Said second party also agrees that he will not assign or transfer this lease without the written assent of said first party; and at the end of the said term shall and will peaceably and quietly leave, surrender, and yield up the buildings now on said premises unto the said party of the first part, her heirs or assigns, in as good condition as when possession is given, damages by the elements excepted."

NOTE: From *Darling v. Hoban*, 83 Mich. 599, 19 N. W. 545.

SEC. 1330. AGREEMENT FOR LEASE WITH COVENANT BY LESSEE TO ERECT BUILDINGS AND WITH OPTION TO LESSOR TO EXTEND LEASE IN PERPETUITY, OR TO PURCHASE THE BUILDING AT THE APPRAISED VALUE, OR TO SELL THE LOT TO THE LESSEE AT THE APPRAISED VALUE, WITH PROVISIONS FOR APPRAISEMENT.

THIS INDENTURE made the first day of October in the year of our Lord one thousand eight hundred and sixty-seven, Witnesseth: That Eben Steele of Portland, Maine, doth hereby lease, demise, and let unto Thaddeus C. Lewis, of said Portland, a store lot on the northerly side of Middle Street, in said Portland, between the lot now owned by the heirs of the late Martha F. Trask, and the lot now owned by David Keazer, and which was conveyed to me by the Ocean Insurance Company, by deed dated May 6, 1847, and recorded in the Cumberland Registry, Book 203, Page 71, a division of the whole lot having afterwards been made, between said Steele and said Trask heirs, owners, of the other moiety, and the eastern half conveyed to said Steele, in severalty, which is now hereby leased to said Lewis, subject to the agreement of April 20, 1831, between William McLellan and others, and recorded Book 126, Page 158.

To hold, for the term of twenty-five (25) years from the first day of October, 1867, yielding and paying therefor, the rent of four hundred and fifty dollars per year. And the said Lessee doth covenant to pay the said rent in quarterly payments, as follows, viz: One hundred and twelve [and] 50/100 dollars, on the first day of January, April, July and October annually; and also within one year, to erect on said premises a store of three stories of brick, iron and stone, of good style, and to continue to maintain on said premises, such building, or one of equal value during the term, and to pay all taxes duly assessed thereon, during the term, and for such further time as the Lessee may hold the same. At the end of said term of twenty-five years, the Lessor, or his representatives, shall have the privilege of extending this lease, by a perpetual lease forever, to the Lessee, or his assigns, at the above described rent and taxes; or, if the Lessor, or his assigns or representatives prefer, they may have an appraisal of the lot,

and building thereon, with the option on their part, of purchasing such building at such appraised value or of selling to the Lessee or his representatives the lot at such appraised value, whichever the Lessor, his assigns, or representatives may then elect. Each party, on request, to choose an appraiser, and the two selected, to choose a third; and if either party neglects to choose an appraiser, such appraiser is to be selected for such party, by the Judge of Probate of Cumberland County; and the appraisal of a majority of such appraisers to be conclusive in case of disagreement.

And the said Lessee doth hereby covenant, for himself, his heirs and representatives, to purchase said lot at such appraisal, or to convey said building to the Lessor, or his representatives, according to the decision and election of said Lessor, or his representatives or to execute and complete a perpetual lease of said lot, as before stipulated, at the end of said term, if the Lessor, or his representatives shall demand such lease. The building erected on said lot is hereby pledged and conveyed to the lessor, his heirs, executors, and assigns, as security for the faithful performance of this agreement, and every covenant therein by the Lessee, his heirs, executors or assigns. And the Lessor may enter, to expel the Lessee, and his assigns, if he or they shall fail to pay the rent aforesaid, whether said rent be demanded or not, or if they shall violate any of the covenants of this lease, by them to be performed.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals, the day and year first above written.

EDEN STEELE, (SEAL)

THADDEUS C. LEWIS. (SEAL)

In Presence of

THOMAS R. HAYES.

WOODBURY ROBINSON.

NOTE: From York County Sav. Bank v. Abbot, 131 Fed. 980, 139 Fed. 988.

SEC. 1331. OPTION IN LEASE FOR EXTENSION UPON NOTICE, AND OPTION TO LESSEE TO PURCHASE WITH PROVISION AS TO RENTS.

“And the said John Snyder further covenants and agrees to and with the said party of the second part that he will let



and demise to them the premises hereby demised for a further term of five years from the expiration of the term hereby created, and upon the same terms as to amount and payment of rent, if the said party of the second part shall so desire, and shall give notice hereof at least three months before the expiration of this lease; and further, that if the said party of the second part shall desire to purchase the demised premises, that he will at any time during the tenancy hereby created or agreed upon, for the consideration of seven thousand dollars, sell and convey by warranty deed, with the usual full covenants, free and clear of all incumbrances, the demised premises to the said party of the second part, or such person or persons as they shall desire, upon their giving to him, his heirs, executors, or administrators, notice that they desire such conveyance; such conveyance to be made within thirty days after the giving of such notice, and the payment of rent to cease at the delivery of such deed, and, if not delivered within said thirty days, then said rent to cease at the end of that time."

NOTE: From *Congregation etc. v. Gerbert*, 57 N. J. L. 395, 31 Atl. 383.

#### SEC. 1332. OPTION TO LESSEE TO EXTEND LEASE.

"The party of the second part, upon the expiration of the said term of one year, shall have the right at its option to continue this agreement and lease for another full term of five years beginning April 1, 1900, at the same yearly rental, i. e., \$125 payable as aforesaid with the right and option to have an extension and continuance hereof at the same yearly rental at the end of said first term of five years for another full term of five years."

NOTE: From *Atlantic Product Co. v. Dunn*, 142 N. C. 471, 55 S. E. 299.

#### SEC. 1333. LEASE WITH OPTION TO LESSEE TO RENEW, WITH PROVISION AGAINST SECOND RENEWAL.

*"Know all men by these presents:*

"That this contract and indenture made and entered into this twenty-second day of January, A. D. 1906, by and between Judson Briggs, of Brownville, and Ezekiel L. Chase, also of

said Brownville, witnesseth: That the said Briggs in consideration of the covenants and agreements hereinafter set forth and indicated on the part of said Chase hereby leases and demises unto said Chase the following described premises and appurtenances, situate in said Brownville.

(Description of property.)

“To have and to hold for the term of one year from the date hereof, with the privilege on the part of said Chase of renewing on the same rental for any term not exceeding ten years from the expiration of said one-year term.

“Yielding and paying therefor the sum of (\$160.00) one hundred sixty dollars per year, same to be paid, and such rental to be in full for rent, heat and light as aforesaid.

“And the said Chase hereby accepts the said premises as described and for the term aforesaid, and covenants to and with the said Briggs to pay the rent as stipulated and in the manner stipulated, and to quit and surrender up the said premises at the expiration of this or of the renewal term, in good order and condition as the same now are or may be put into by said Briggs, reasonable use and wear thereof, fire and other unavoidable casualty excepted, and not to use the said premises for any purpose usually denominated as extra-hazardous, and not to sublet the same without the consent in writing of the said Briggs first obtained.

“It is mutually understood that the said right of renewal as stipulated shall be wholly optional with the said Chase, and that such renewal, while in all other respects the same as is this lease, shall contain no further right of renewal except by mutual agreement.

“IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals this day and year first above written.

“JUDSON BRIGGS. (L. S.)

“E. L. CHASE. (L. S.)”

NOTE: From *Briggs v. Chase*, 105 Me. 317, 74 Atl. 796.

SEC. 1334. OPTION IN, TO RENEW ANNUALLY FOR FOUR SUCCESSIVE YEARS, WITH PROVISION RESERVING THE RIGHT TO THE LESSOR TO SELL THE PREMISES.

“State of Texas, Tom Green County. This agreement, made and entered into this 1st day of September, 1891, by and between F. B. Ewing and J. R. Frost, as lessors, acting herein by said F. B. Ewing, of the first part, and J. S. Miles, lessee, of the second part, witnesseth: 1st. That, for the consideration hereinafter specified and agreed to be paid, the said parties of the first part have leased and let, and by these presents do lease and let, unto the said party of the second part, J. S. Miles, for the full term of one year from and after September 1st, 1891, next ensuing, the following described premises, situate in Tom Green County, State of Texas, to-wit: (Description.)

“To have and to hold said premises, with the rights and privileges thereto belonging, unto him, the said J. S. Miles (lessee), from September 1st, 1891, up to and including the 31st day of August, 1892. 2nd. The consideration for this lease is the monthly rental of fifty (\$50) dollars per month, to be paid at the end of each month, during the term aforesaid, in cash; and, to secure the payment of the same, it is understood and agreed that the lessors shall have and retain the landlord's lien on all the personal property of the lessee situate in said leased premises. 3rd. And the lessee promises and agrees to occupy said premises for the term aforesaid, and during any renewal of this lease, as the tenant of said lessors; to pay the monthly rental above specified promptly at the end of each current month; and not to sublet said premises or assign this lease without the written consent of the lessors first obtained. 4th. It is understood and agreed that the lessee shall have the right hereby expressly granted him to renew this lease at the end of the term hereof for another term of twelve months next succeeding the term hereof, and so on for four consecutive years from August 31st, 1892, at the same rental as above specified, payable at the end of each month; provided, that the lessors shall have the right at any time to sell said premises, and in case of sale the lessee shall surrender possession of said premises to the pur-

chaser at the end of the current year during which the sale shall be made, and such sale shall terminate the rights of the lessee at the end of each current year; but nothing herein shall be construed to require the lessee to surrender possession except at the end of the current year during which the sale shall be made, if the rents shall be promptly paid as herein stipulated. Witness the hands of the parties this day and date first above written. Ewing & Frost, Lessors, per F. B. Ewing. J. S. Miles, Lessee."

NOTE: From *Ewing v. Miles*, 12 Tex. Civ. App. 19, 33 S. W. 235.

#### SEC. 1335. OPTION ON MINERAL RIGHTS IN LAND.

"For and in consideration of one dollar in hand paid, the receipt of which is hereby acknowledged, as well as in consideration of the sum of \$200, to be paid as follows, viz: In cash upon the delivery of the deeds,—we hereby sell and agree to convey by deed of general warranty to Elias H. Kerce, successors and assigns, subject to purchaser's examination of the title, all the mineral interest in that certain piece or parcel of land situated in Floyd County, and State of Georgia, bounded and described as follows: Lot 138 in 23rd district, third section,—together with all mineral rights and privileges, wood, water, and right of way,—containing one hundred and twenty-eight acres, more or less. A deed to be executed and delivered to said Elias H. Kerce, his heirs, successors, or assigns, at any time within two hundred days, upon the payment of the balance of the purchase money; and, in case the balance of the purchase money is not paid as before stated, then this agreement to be null and void, and the money paid thereon to be considered as forfeited to the undersigned as liquidated damages. For the faithful performance of the covenants herein contained, we bind ourselves by these presents. Witness our hands and seals this 16th day of January, 1896. (Signed) R. B. Maddox. (Seal.) J. H. Maddox. (Seal.) M. O. Maddox. (Seal.) A. E. Maddox. (Seal.) In presence of J. E. Almon."

NOTE: From *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723.

**SEC. 1336. OPTION TO PURCHASE COAL IN CERTAIN LAND.**

“Article of agreement made November 23, 1900, between Robert Mitchell, of Indiana Borough, Indiana County, and State of Pennsylvania, of the first part, and S. M. McHenry, of White Township, Indiana County, Pa., of the second part, witnesseth: That the said party of the first part, for the consideration hereinafter mentioned, hereby agrees to sell and convey by deed of general warranty, clear of all incumbrances, unto the said party of the second part, his heirs and assigns, all the coal of whatever kind in and under all that certain tract of land situate in White Township, Indiana County, and state aforesaid, bounded and described as follows:

(Description.)

“Together with the full, perpetual and exclusive right to enter in, upon, and under the said lands to dig, test, drill and explore for said coal, and to mine, remove and transport the same from this and other lands with the full privileges which are usual and necessary for mining purposes, without liability for damages. In consideration whereof, the said party of the second part, his heirs and assigns, agrees to pay, or cause to be paid, to the said party of the first part, \$18.00 per acre for each and every acre of coal contained therein, on or before three months from date hereof, upon presentation and delivery of a good and sufficient deed, clear of all incumbrances; payments to be made as follows: One-third at time of presentation and delivery of the deed, one-third in one year with interest, one-third in two years, with interest from date of first payment with the privilege of paying in full at any time before maturity. Deferred payment to be secured by bond and mortgage on the coal. It is further understood and agreed, by the parties hereto, that in case payment is not made as hereinbefore stipulated, then this agreement to be null and void and of no effect whatever, and all parties hereto to be released from all liability herein.”

**NOTE:** From *McHenry v. Mitchell*, 219 Pa. 297, 68 Atl. 729. See, also, *Barnes v. Rea*, 219 Pa. 279, 68 Atl. 836.

## SEC. 1337. OPTION TO PURCHASE FIFTY-ONE PER CENT OF GOLD MINING CLAIM.

“This option and memoranda of agreement, this day entered into between C. O. Lagerfelt, party of the first part, and E. W. Morris, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one hundred (\$100.00) dollars, to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, sells to the party of the second part an option of the purchase by the party of the second part, of the party of the first part, of fifty-one per centum interest in and to the following described gold-mining claim, situated in Organ mining district, in Dona Ana County in the Territory of New Mexico, said mining claim being located and described as follows: That certain lead, lode, or mining claim known as the ‘Dagmar Gold-Mining Claim,’ situated in the Organ mountain mining district, Territory of New Mexico, distant about twenty-seven miles from Las Cruces, New Mexico, and lying between two mining claims known respectively as the Alabama Bell gold-mining claim and the Oro Fino gold-mining claim, said Dagmar claim being a parallelogram 600 feet wide by 1200 feet long, and more particularly described as follows: Beginning at a monument of stones at the westerly end center of said claim, thence three hundred feet to a monument of stones at the northwest corner of said claim, thence three hundred feet to a monument of stones at the easterly end center of said claim, thence three hundred feet to a monument of stones at the southeast corner of said claim, thence twelve hundred feet to a monument of stones at the southwest corner of said claim, thence three hundred feet to a monument of stones at the westerly end center of said claim, the point of beginning. This option to continue for 30 days from the date hereof. The terms of the purchase of said interest in said mining property, if above option is carried out, is twelve thousand and five hundred (\$12,500.00) dollars, to be paid as follows: Six thousand two hundred and fifty (\$6,250.00) dollars to be paid by the party of the second part, to the party of the first part, within thirty days from the date hereof, and the remainder, six thousand two hundred and fifty (\$6,250.00) dollars, to be paid in the same way two

months from the date hereof. If the party of the second part fail to make the second payment as [and] when the same falls due, then this agreement shall be utterly null and void, and the first payment of six thousand two hundred and fifty dollars (\$6,250.00) shall remain and continue the property of the party of the first part as liquidated damages for the breach of this agreement, and not as a penalty, and the party of the second part hereby relinquishes all right to the same, or any part thereof. If the said first payment of six thousand two hundred and fifty dollars (\$6,250.00) shall be made or lawfully tendered to the party of the first part within the said thirty days, hereinbefore mentioned by the party of the second part, and the said party of the first part shall fail or refuse, on said payment or tender, to assign and transfer to the party of the second part said fifty-one per centum interest in said mining-claim property, then, and in that case, the party of the first part hereby agrees to pay to the party of the second part the sum of one hundred dollars (\$100.00) as liquidated damages for the breach of this agreement, and not as a penalty; and he hereby waives all exemptions as to said liquidated damages, and the party of the second part, in order to secure the payment of said six thousand two hundred and fifty (\$6,250.00) dollars, hereby gives the party of the first part a lien on said fifty-one per centum interest in said mining claim and property until said sum is paid. In duplicate, this 25th day of July, 1891. (Signed) C. O. Lagerfelt. E. W. Morris."

NOTE: From *Morris v. Lagerfelt*, 103 Ala. 608, 15 So. 895.

**SEC. 1338. AGREEMENT TO GIVE OPTION ON CAPITAL STOCK TO SYNDICATE WHICH AGREES TO DO EXPLORATION WORK ON MINES.**

THIS AGREEMENT, made the 17th day of March, 1897, between the Merchants' & Miners' National Bank, of Philipsburg, Montana, Joseph H. Harper, and Joseph H. Harper, assignee of Durfee & Sherman; M. L. MacDonald, Robert McArthur, David Sterrit, and Mrs. F. W. Sherman, of Butte, Montana, the parties of the first part, and Henry Williams, William Thompson, James Hamilton, W. R. Kenyon, Joseph H. Harper, and F. W. Sherman, of Butte, Montana, the parties of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the various payments to be made as hereinafter specified, as well as of the mutual covenants and conditions herein contained, agree to sell and convey unto the said parties of the second part, their heirs and assigns, three hundred thousand (300,000) shares of the capital stock of the Sunrise Mining & Milling Co., held by the said parties of the first part in the following portions, to-wit:

The said Merchants' & Miners' National Bank holds one hundred and twenty-seven thousand and twenty-nine and  $\frac{2}{3}$  shares (127,029 $\frac{2}{3}$ ) as collateral security for indebtedness of said Durfee & Sherman. The said Joseph H. Harper holds twenty-five thousand (25,000) shares in his own right, and one hundred and thirty-eight thousand, three hundred and seventy-one (138,371) shares as assignee of said Durfee & Sherman. M. L. MacDonald holds three thousand (3,000) shares, Robert McArthur, one thousand, five hundred (1,500) shares, David Sterrit, three thousand (3,000) shares, and Mrs. F. W. Sherman, two thousand, one hundred (2,100) shares.

The said stock is to be deposited in escrow in the Merchants' & Miners' National Bank of Philipsburg, immediately upon the execution of this agreement.

The said second parties are to work and explore the mines of the said Sunrise Mining & Milling Co., situated at Sunrise, in Granite County, during a period of four (4) months, which said work must be begun on or before the first day of April, 1897, and must be prosecuted with diligence. The said second parties shall employ in said work at least five (5) men continuously, but the said work shall be deemed continuous within the meaning of this agreement if the said second parties shall employ the said five (5) men or more during the twenty-five (25) days of each and every month from the time of their commencing work under this agreement. The said second parties shall, on or before the 11th day of July, 1897, pay, or cause to be paid into the said Merchants' & Miners' National Bank the sum of two thousand and eighty-three and  $\frac{76}{100}$  dollars (\$2,083.76), which said sum shall be applied in payment of the interest due said bank upon the indebtedness of said Durfee & Sherman and on the same day shall pay, or



cause to be paid to the said Joseph H. Harper for himself, and as trustee for said M. L. MacDonald, Robert McArthur, David Sterrit, and Mrs. F. W. Sherman, the further sum of three hundred and thirty-four and 73/100 dollars (\$334.73). The said parties of the second part shall on or before November 11, 1897, pay or cause to be paid into the said Merchants' & Miners' National Bank to the credit of said Joseph H. Harper, assignee of said Durfee & Sherman, the further sum of nineteen thousand, three hundred forty-one and 31/100 dollars (\$19,341.31), and shall also pay or cause to be paid to the said Joseph H. Harper for himself, and as trustee for said M. L. MacDonald, Robert McArthur, David Sterrit and Mrs. F. W. Sherman, the further sum of two thousand, seven hundred forty-five and 95/100 dollars (\$2,745.95).

But if the said parties of the second part shall fail to work the said mines of the said Sunrise Mining & Milling Company, as hereinbefore provided, or shall fail to make any of the payments herein provided for on or before the time when the same shall become due, then the parties of the first part may, at their option, declare this contract void, time being of the essence of this agreement to convey, and shall thereupon be entitled to the immediate possession of the said stock.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands the day and year in this instrument first above written.

(Signatures of all parties.)

NOTE: From *Godfrey v. McConnell*, 151 Fed. 783.

#### SEC. 1339. OIL AND GAS LEASE WITH OPTION TO LESSEE TO SURRENDER OR TERMINATE.

“Agreement made this eighth day of December, A. D. 1896, between Catherine Fowler and Jeremiah Fowler, her husband, of the Township of North, County of Harrison, and State of Ohio, lessor, and H. A. Snyder, lessee, witnesseth: That the lessor, in consideration of one dollar, the receipt of which is hereby acknowledged, does hereby demise and grant unto the grantee, his heirs and assigns, all the oil and gas in and under the following described tract of land, and also the said tract of land for the purpose and with the exclusive right of operating thereon for said oil and gas, together with all the

rights of way, the right to lay pipe lines on and over and to use water from said premises, and also the right to remove at any time any property placed thereon by the lessee; which tract of land is situated in the Township of North, County of Harrison, and State of Ohio, and is bounded and described as follows, to-wit: North by lands of Jeremiah Arbaugh, east by lands of Widow Arbaugh, south by lands of William Donaldson, west by lands of Canaga; containing twenty acres, more or less. To have and to hold the same unto the lessee, his heirs and assigns, for the term of two years from the date hereof, and as long thereafter as oil or gas is found in paying quantities thereon, not exceeding in the whole the term of twenty-five years from the date hereof, yielding and paying to the lessor the one-eighth part of all the oil produced and saved from the premises, in tanks or in pipe lines to the lessor's credit; and, should any well produce gas in sufficient quantities to justify marketing, the lessor shall be paid at the rate of one hundred and fifty dollars per year for each well so long as the gas therefrom is sold. In case no well shall be drilled on said premises within twelve months from the date hereof, this lease shall become null and void, unless the lessee shall pay for the further delay at the rate of one dollar per acre at or before the end of each year thereafter until a well shall be drilled. Such payments may be made in hand or by deposit to the lessor's credit in the Scio Bank. It is agreed that the lessee shall have the right at any time to surrender this lease to lessor for cancellation, after which all payments or liabilities to accrue under and by virtue of its terms shall cease and determine, and the lease become absolutely null and void. It is understood that all the terms and conditions between the parties hereto shall extend and apply to their respective heirs, executors, administrators and assigns. Witness the hands and seals of the parties. Catherine Fowler. (Seal.) J. Fowler. (Seal.) H. A. Snyder. (Seal.)"

NOTE: From *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76.

#### SEC. 1340. LEASE IN FORM HELD MERE OPTION.

"Agreement of lease, made this 8th day of July, A. D. 1905, between Allen Cortelyou, and Ella A., his wife, of Robinson, Ill., lessor, and W. W. Seybert of McKee's Rocks, Pa., lessee,

witnesseth: That the lessor[s] hereby grant unto lessee for the term of three (3) years, (and so long thereafter as oil or gas is produced from the land leased and royalty and rentals paid by lessee therefor,) the exclusive right to mine for and produce petroleum and natural gas from and the possession of so much of eighty (80) acres of land in Crawford County, State of Illinois, as may be necessary therefor, with the right to use water and gas (if found) for the necessary engines, and to remove all machinery, fixtures, etc., placed by lessee on the premises, said land bounded: E.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  of Sec. 30, T. 7, N. R. 12 W. No well to be drilled within three hundred feet of the buildings without lessor's consent. The lessee to deliver to lessor, in pipe line, the one-eighth ( $\frac{1}{8}$ ) of all petroleum produced from the premises and to pay one hundred (\$100) dollars per annum for each gas well from which the gas is marketed, payable semi-annually, from the date and while the same is so utilized, and to pay all damages to growing crops. This lease is to be null and void and no longer binding on either party if a well is not commenced on this block of 1000 acres within twelve months from this date, unless the lessee shall thereafter pay annually to lessor twenty-five cents per acre per year for each year's delay in commencing said well. Each payment to extend the time for completion for one year. A deposit to the credit of lessor in Oblong Bank, Oblong, Ill., to be a good payment of any money on this lease. Party of the first part to have free gas for the dwelling thereon by laying their own line and making connections at well, provided there is a surplus gas, and at no time to use gas out of dwelling. The lessee to have use of all casing-head gas for drilling and producing purposes, and to pipe the same to any well drilled by lessee on these premises. Party of the second part to protect all lines. All grants and covenants to extend to the heirs and assigns of the parties hereto. Lessee to bury all pipe lines below plow depth when requested.

Witness the hands and seals of the parties.

ALLEN CORTELYOU, (SEAL)

ELLA A. CORTELYOU, (SEAL)

W. W. SEYBERT. (SEAL)''

Witness: W. C. CORTELYOU.

NOTE: From Cortelyou v. Barnsall, 236 Ill. 138, 86 N. E. 200.

**SEC. 1341. CLAUSE IN MORTGAGE ON REAL ESTATE MATURING DEBT, AT OPTION OF MORTGAGEE, FOR FAILURE TO PAY PRINCIPAL OR INTEREST.**

“In case any principal or interest as provided in said notes shall become due and remain unpaid, then the whole of the principal and interest of said notes and all moneys secured hereby shall immediately [at the option of the mortgagee] become due and payable, and this mortgage may be foreclosed for the whole of such moneys.”

NOTE: From *Coman v. Peters*, 52 Wash. 574, 100 P. 1002.

**SEC. 1342. MORTGAGE ON REAL ESTATE, OPTION IN TO MORTGAGEE TO MATURE DEBT UPON DEFAULT BY MORTGAGOR IN PAYMENT OF PRINCIPAL OR INTEREST, IN CASE OF WASTE, FAILURE TO PAY TAXES, OR TO PROCURE OR RENEW INSURANCE, ETC.**

“It is further provided and agreed, that if default be made in the payment of the said ..... or any part thereof, or the interest thereon, or any part thereof, at the time and in the manner and at the place above limited and specified for the payment thereof, or in case of waste or non-payment of taxes or assessments, or neglect to procure or renew insurance, as hereinafter provided, or in case of the breach of any of the covenants or agreements herein contained, then and in such case, the whole of said principal and interest secured by the said ..... in this mortgage mentioned, shall thereupon, at the option of the said party of the second part, its successors, attorneys or assigns, become immediately due and payable,” etc.

**SEC. 1343. MORTGAGE ON REAL ESTATE, OPTION IN NOTE SECURED BY, TO ACCELERATE MATURITY, UPON DEFAULT IN PAYMENT OF INTEREST, TAXES, ETC.**

“On the first day of December, 1913, for value received, I promise to pay to Guaranty Loan & Investment Company, of Spokane, Washington, or order, the principal sum of fifteen hundred dollars (\$1,500), with interest thereon, at the rate

of eight per cent per year from the date hereof until maturity, payable semi-annually according to the tenor of six interest notes, each for sixty dollars (60) bearing even date herewith; both principal and interest notes payable at the office of Guaranty Loan & Investment Co., Spokane, Wash. (with exchange on New York). And if default be made in the payment of any of said notes so secured, or any part of them, as the same mature, for the space of thirty days, or if the maker of this note and interest notes attached hereto shall allow the taxes or any other public rates and assessments on the mortgaged property, or any part thereof securing the aforesaid notes, to become delinquent, or shall do any act whereby the value of said mortgaged property shall be impaired, or in case any taxes or assessments shall be levied against the holder of this note, on account of this note, then upon the happening of any of said contingencies, the whole amount herein secured shall at once become due and payable, and the mortgagee, its legal representatives or assigns, may proceed at once to collect these notes and foreclose the mortgage given to secure the same, and sell the mortgaged property, or so much thereof as shall be necessary to satisfy said debt, interest and costs, and all taxes, public rates, or assessments that may be due thereon, together with a reasonable attorney's fee, if suit be commenced for the purpose of collecting this debt or foreclosing the mortgage securing the same. It is expressly agreed and declared that these notes are made and executed under and are in all respects to be construed by the laws of the State of Washington, and are secured by mortgage of even date herewith, duly recorded in Spokane County, of the State of Washington. This note bears interest at the rate of twelve per cent per annum, payable yearly, after maturity.

"Dated at Spokane, State of Washington, this first day of December, 1910.

J. P. J."

**NOTE:** From *Bright v. Offield*, 81 Wash. 442, 143 P. 159.

# SEC. 1344. NOTICE OF ELECTION TO PURCHASE. GENERAL FORM.

To A B

.....

Sir: Referring to that certain option contract in writing dated ....., 191., given by you to the undersigned (or given by you to E F and by him duly assigned to the undersigned) and conveying the following described property, to-wit:

(Here insert description of property.)

You are hereby notified that the undersigned hereby elects to purchase the said property for the price and upon the terms and conditions of the said option contract and is able and ready to perform the said contract on his part.<sup>1</sup>

(If payment of the price, or any part thereof, is due and payable, under the terms of the option, at the time of election, it must be then tendered in order to make a good election; and so of tender of performance of any other act which is part of the election.)

C D

Dated ....., 191..

# SEC. 1345. GENERAL FORM OF OPTION TO PURCHASE REAL ESTATE.

THIS AGREEMENT, made this ..... day of ....., 191., by and between A B, of ....., hereinafter

<sup>1</sup> The election is not required to be in any particular form unless by virtue of the provisions of the option contract. See Sec. 815. As to an oral election being within the Statute of Frauds, see Secs. 414-415.

The election must be strictly in accordance with the terms of the option contract. If it falls short of those terms or requires from the optionor some unauthorized act on his part, it is, speaking generally, insufficient. In other words the time, place and mode of election are fixed by the option contract, or are implied by law, and an election varying from the terms fixed or implied, will not raise the option to a bilateral contract. See Sec. 840.

One of the most fruitful sources of litigation has been qualified or conditional election. That is, an election made conditional on the doing by the optionor of some act not required by the terms of the option contract, such, for instance, as on condition that an abstract of title be furnished when the option contains no such requirement, and no such duty is imposed by law or by custom. See Secs. 841 *et seq.*

called Optionor, and C D of ....., hereinafter called Optionee, witnesseth:

a. That for and in consideration of the sum of \$. . . . .<sup>1</sup> paid by the Optionee to the Optionor, the receipt of which is hereby acknowledged by the Optionor,<sup>2</sup> the Optionor gives and grants to the Optionee and to his heirs and assigns,<sup>3</sup> the exclusive<sup>4</sup> right or privilege of purchasing the following described property owned by the Optionor,<sup>5</sup> to-wit:

(Here insert description.<sup>6</sup>)

b. The option price for said property is \$. . . . .,<sup>7</sup> and upon election to purchase shall be due and payable by the Optionee,<sup>8</sup> to the Optionor, at ....., as follows, to-wit:

(Here set forth the cash or deferred payments, or both, and also description of the security to be given, if any, and the rate of interest, if any, on deferred payments, and the time when the interest is payable.<sup>9</sup>)

c. Notice of election to purchase hereunder by the Optionee or his assigns, shall be in writing<sup>10</sup> and shall be given to the Optionor at .....<sup>11</sup>

1 A nominal money consideration is sufficient. See Secs. 325-330.

2 Effect of recital of consideration, see Sec. 331.

3 Words of assignment may not be necessary in a particular jurisdiction, but they are given in this general form in order to cover, so far as possible, all cases. See Secs. 601-610.

4 It is not necessary to use the word exclusive. It is here used as a matter of custom. An option privilege is necessarily exclusive. See Sec. 201 n. 1.

5 A person may legally give an option on property of which he is not then the owner. See Sec. 215 n. 11. However, it is just as well to have a provision that will bring out the title of the optionor.

6 The necessity for an accurate description of the property is pointed out in Sec. 214.

7, 8, 9 It is an inflexible rule that the terms of the option contract must be definite, certain and complete. See Secs. 209-213.

10, 11 Notice of election, it is held, may be oral. See Secs. 414, 415, 816. In the absence of an express provision, the law fixes the place of election. But express provisions on these points will, in the long run, prove trouble savers.

*d.* Upon notice of election to purchase being given the Optionor shall, within . . . . days thereafter, furnish, at his own cost and expense and deliver to the Optionee at . . . . ., an unlimited certificate of title,<sup>12</sup> made by the . . . . . Abstract and Title Company of . . . . . The Optionee shall have . . . . days from and after the delivery of said certificate of title within which to examine the same. If the title to said property, as shown by the said certificate of title is well vested in the Optionor and is free and clear of and from all defects, liens, encumbrances, taxes and assessments, except . . . . .

. . . . . then the Optionee shall, within the time aforesaid, perform the provisions of paragraph *b* of this option, and if the said title shall be otherwise than as above stated, then this option shall be at an end and the Optionor shall pay to the Optionee on demand, all moneys theretofore paid by the Optionee on account of the said price, provided, however, that the Optionor shall have . . . . days from and after notice to him, in writing, by the Optionee at the place aforesaid, of any legal ground for rejecting said title, within which to cure any defect in said title, or to remove the said ground of rejection.

*e.* Upon performance by the Optionee hereunder the Optionor shall execute and deliver to the Optionee his deed of conveyance in form of . . . . .<sup>13</sup>

*f.* Possession of said property shall be delivered to the Optionee and he shall be entitled to the same on execution and delivery of deed of conveyance as aforesaid.<sup>14</sup>

<sup>12</sup> This clause is suggestive merely. It may be framed to suit local conditions, but as a general rule the law does not require the optionor to furnish an abstract or certificate of title, except by virtue of an express provision in the option contract. See Sec. 1008.

<sup>13</sup> This clause is suggestive only. In some jurisdictions a warranty deed, and in others, a grant deed, is customary.

<sup>14</sup> An optionee is not entitled to the possession of the property until he is entitled to a deed of conveyance. See Sec. 513. A clause on possession is necessary only when it is desired to change the rule.



*g.* All taxes or assessments levied or assessed upon the said property after notice of election hereunder, shall be paid by the Optionee.<sup>15</sup>

WITNESS the hands of the said parties, in duplicate, the day and year first above written.

A B  
C D

(Acknowledged and certified if desired.)

#### SEC. 1346. INFORMAL OPTION ON LAND.

“TUSCUMBIA, ALA., October 21, 1886.

“For and in consideration of the sum of one dollar in hand paid, I hereby give A. J. Moses an option on my lands and improvements situated near Sheffield, and known as my home place, containing 120 acres, more or less, for the sum of eight thousand dollars, to be paid, say \$3,000 cash, and balance in 1 and 2 years, with interest from date of possession. Money to be paid when titles are approved. This option good for 2 days.

(Signed) “J. W. McCLAIN.”

NOTE: From *Moses v. McClain*, 82 Ala. 370, 2 So. 741.

#### SEC. 1347. OFFER TO SELL LAND IN FORM OF LETTER.

“CINCINNATI, O., Oct., 1902. Mr. J. E. North, Bond, Miss.—  
Dear Sir: We will withdraw our Mississippi tract in Harrison and Pearl River counties from the market until January 1st, 1904, during which time you may send your men to look it over, and if, at the expiration of the time or February 1st, 1904, you decide to take this land, we will sell you eight-ninths and give you warranty deed on the same at the rate of \$20 per acre, and in the meantime we will try to get the consent of the parties owning the other one-ninth at the same price, but will not guarantee their consent. Yours truly, Comstock Bros.”

NOTE: From *Comstock Bros. v. North*, 88 Miss. 754, 41 So. 374.

<sup>15</sup> This clause, also, is suggestive; it is not necessary, but a provision covering taxes and assessments may avoid dispute.

**SEC. 1348. OPTION TO PURCHASE LAND WITH SPECIAL STIPULATION AS TO BREACH.**

“Option contract, between Sol. Mier Co., of Ligonier, Ind., party of the first part, and Samuel B. Hadden and Matilda A. Hadden, his wife, of Ontwa Township, Cass County, Mich., of the second part, to-wit: In consideration of one dollar (\$1.00) paid by party of the first part to party of the second part, the receipt of which is hereby acknowledged and in consideration of the agreements hereinafter set out, said second party hereby sells to said first party for the sum of eighty-three hundred dollars (\$8300.00) to be paid to said second party as follows: Cash upon possession of land (less amount of liens and encumbrances on the real estate) upon execution to said first party of a warranty deed therefor, the following real estate in Cass County, State of Michigan, viz.: Fifty-seven (57) acres off the east side of the northwest quarter ( $\frac{1}{4}$ ) of section seven (7) south of highway and thirty-three (33) acres off the west side of the northeast quarter ( $\frac{1}{4}$ ) south of highway in section seven (7) all in township eight (8) south of range fifteen (15) west containing ninety (90) acres more or less to be more accurate, described in deed. Party of the second part agrees to furnish abstract showing perfect title to said real estate, which title must be made satisfactory to said first party's attorney, and second party agrees to convey said real estate to party of the first part by deed of general warranty. First party may demand the execution of said deed at any time within November 1, 1906, from the date hereof; and if second party fails or refuses to execute the same or fails or refuses to perform the stipulations hereof on his part, then first party may by suit enforce the specific performance by second party of this contract, and the execution of a deed for said real estate, or may, at his option, by suit, recover from said second party, with interest and attorney's fees and without relief, whatever damage he may have suffered by reason of any default on the part of said second party. First party may refuse to purchase said real estate, and, if he does so, shall forfeit and pay to second party with interest and attorney's fees and without relief, the sum of one

dollar (\$1.00) which shall constitute the only liability of first party for such refusal. This contract to be void unless the first party offers performance thereof on his part within said period of November 1, 1906. Deed to be made and delivered at the office of Sol. Mier Co., at South Bend, Ind. It is further agreed that the party of the second part reserve the tenant's interest [in] the one-half ( $\frac{1}{2}$ ) of the wheat sown in the fall of 1906. Possession to be given March 1, 1907. Executed in duplicate this 21st day of June, 1906. Sol. Mier Co., by Leon Rose. (Seal.) Samuel B. Hadden. (Seal.) Matilda A. Hadden. (Seal.)"

NOTE: From *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586, 12 Ann. Cas. 88.

#### SEC. 1349. OPTION ON LANDS. GENERAL DESCRIPTION OF LAND.

"This agreement, entered into this 4th day of July, 1903, by and between Moreland & Pugh, of Hayward, Wis., parties of the first part, and Geo. L. Arentsen, of Hayward, Wis., party of the second part, witnesseth: The party of the first part agrees to give the party of the second part an option of ninety days (90) on all the lands they now control, belonging to the North Wisconsin Lbr. Co., excepting the west  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  Sec. 24, all the above lands situated in town 43, R. (8) west, Bayfield county, Wisconsin, about (8500) acres. Consideration of the above option is to be three hundred dollars (\$300).

One hundred (\$100) in hand paid.

One hundred (\$100) in thirty (30) days from date.

One hundred (\$100) in sixty (60) days from date.

The purchase price of the above lands is to be three dollars (3.00) per acre.

MORELAND & PUGH, (SEAL)

GEO. M. ARENTSEN. (SEAL)

Witnesses: F. L. CLARK,

C. P. HENDRICKSON."

NOTE: From *Arentsen v. Moreland*, 122 Wis. 167, 99 N. W. 790, 106 A. S. R. 951, 65 L. R. A. 973, 2 Ann. Cas. 628.

**SEC. 1350. OPTION ON FARM AND ALL PROPERTY THEREON EXCEPT LIVESTOCK.**

ST. LOUIS, January 17th, 1906.

"This agreement made this 17th day of January, 1906, between Louis Spelbrink of the city of St. Louis, and state of Missouri, party of the first part, and Aiple & Hemmelmann Real Estate Company, agent, of the same place, party of the second part, witnesseth: and whereas, the party of the first part, for and in consideration of the sum of fifty (\$50.00) dollars, in hand paid by the party of the second part, the receipt of which is hereby acknowledged, does hereby give and grant to the party of the second part, the option, privilege, and right of purchase for forty-five (45) days from this date, situated in the county of St. Louis, Missouri, to wit: Ninety (90) and 9/100 acres on the west side of Denny road, running to Spoele road, and bounded south by property of Schneider and West End Park, and including everything on the premises, excepting livestock, for the sum of twenty thousand (\$20,000.00) dollars, payable in terms of one-third cash and the balance in three years at 5 per cent. Party of the first part hereby agrees and guarantees to deliver to party of second part, on payment of said purchase money, a warranty deed to said real estate, and that title to said land shall be perfect and free from all incumbrances, liens or adverse titles. Should the party of the second part, within said period of forty-five (45) days, accept the proposition of the first party to sell said real estate, and agree to take the same at the price and on the terms aforesaid, and tender to the party of the first part the said sum of twenty thousand (\$20,000.00) dollars, then the party of the first part hereby binds himself to execute to said party of the second part a good and sufficient deed of conveyance, as above, for said real estate. In testimony, we, the parties hereto, have hereunto set our hands and seals in triplicate this 17th day of January, 1906.

(Signed) LOUIS SPELBRINK. (SEAL)"

"I agree to pay Aiple & Hemmelmann R. E. Co. a commission of five per cent (5 per cent) on consummation of above sale.

(Signed) LOUIS SPELBRINK. (SEAL)"

**NOTE:** From Aiple & Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652.

SEC. 1351. OPTION TO PURCHASE LAND WITH CLAUSE GIVING RIGHT TO HAVE DEED MADE DIRECT TO PURCHASER FROM OPTIONEE, AND PROVIDING FOR MORTGAGE TO SECURE DEFERRED PAYMENT OF PRICE EVIDENCED BY NOTES.

“For and in consideration of one hundred seventeen dollars in hand paid, and other good and valuable considerations rendered by E. J. Breen of Fort Dodge, Iowa, the receipt of which is hereby acknowledged, I, L. A. Mayne, of Cerro Gordo county, state of Iowa, agree to sell to said E. J. Breen, at his option, at any time on or before October 17th, 1906, the following described premises situated in the county of Cerro Gordo and state of Iowa (here follows a description of the property), containing 117 20/100 acres at the agreed price of one hundred and fifty dollars per acre and upon the terms as follows: Seventeen thousand five hundred and fifty dollars on delivery of deed. All of the deferred payments to draw interest at the rate of . . . . . per cent from the date of deed, payable annually. And said L. A. Mayne expressly agrees that in case that E. J. Breen sells said herein above described land at any time within the term of his contract, that he will at the request of said E. J. Breen, execute and deliver to the purchaser, that may be named by said E. J. Breen, a good and sufficient warranty deed, with full covenants, conveying and assuring the fee simple of said premises, together with an abstract showing perfect title in giver of deed, and agrees to accept the purchaser's notes for the deferred payments, said notes being in amount, and time of payment as above set forth, and secured by . . . . . mortgage on above described premises. In witness of which said parties have hereunto caused these presents in duplicate to be executed on this 17th day of April, A. D. 1906. J. J. Mayne. L. A. Mayne. Witness, C. H. McNider.”

NOTE: From *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441.

SEC. 1352. OPTION ON LAND TAKING FORM OF DEPOSIT OF DEED OF CONVEYANCE WITH BANK.

“In consideration of \$100 to me in hand paid by William Kissack, trustee, the receipt whereof is hereby acknowledged,

I agree to sell and convey to said William Kissack, trustee, the remaining seventy-nine acres of land, more or less, of the farm owned by me in the town of Algonquin, in McHenry County, Illinois, (after deducting the portion heretofore sold by me to said William Kissack, trustee,) for the sum of \$9900, provided said William Kissack deposits said sum of \$9900 for said land with the First National Bank of Elgin, Illinois, within sixty days after the date hereof, to be delivered to me by said bank on receipt of a warranty deed from me to said William Kissack, trustee, of said seventy-nine acres of land, more or less, free and clear of all encumbrances, (except that said deed shall be made subject to the interest of Henry Dahn, as tenant of said premises,) with the abstract of title to said premises now owned by me brought down to date; but in case said William Kissack, trustee, shall fail to deposit the sum of \$9900 with said bank, as aforesaid, within sixty days from this date, this instrument is to be returned to me by said bank, where it is to be deposited and held in the meantime. Dated this 25th day of October, A. D. 1905. William Bourke. (Seal.)”

NOTE: From *Bourke v. Kissack*, 242 Ill. 233, 89 N. E. 990.

SEC. 1353. DOUBLE OPTION TO PURCHASE OR TO LEASE WITH PERMISSION FOR ERECTION OF BUILDING.

“PROVIDENCE, R. I., March 25, 1908. Mr. Albert F. Eastman, Providence, R. I.—Dear Sir: First. I offer to sell you my estates designated as No. 116 Mathewson Street and No. 43 Clemence Street, in the City of Providence, said estates together running from Mathewson Street to Clemence Street, for the sum of forty-two thousand dollars (\$42,000). Second. I offer to lease you the above estates for the term of twenty (20) years from April 20th, 1908, at the following rental: For the first ten years, \$1,680 per year and for the next succeeding ten years, \$2,520 per year, said rent to be payable quarterly, provided that you pay in addition all current taxes, curbing assessments, sewer assessments and assessments of every kind which may be imposed upon said property during the continuance of the lease, so that the above named rental shall be net to me. Provided further, that you shall erect within one year after the execution of the lease, a substantial

building, which shall cost not less than ten thousand dollars (\$10,000), which shall have proper foundation and which shall be erected in accordance with the building laws of the City of Providence. And provided further that you shall give a bond with sureties satisfactory to me, that such building will be erected as above stated. And said building and any improvements made by you upon these estates shall become the property of myself, my heirs and assigns, upon the termination of the lease, unless you elect to purchase the estates as hereinafter provided. In case you take the lease of said estates, you are to have the privilege at any time during the first two years of the same to purchase the property for the sum of forty-five thousand dollars (\$45,000); during the succeeding five years for the sum of forty-seven thousand five hundred dollars (\$47,500); and during the succeeding three years for the sum of fifty thousand dollars (\$50,000). Provided, that at any of the above times at which you may elect to purchase the same, you shall give one month's notice in writing to me; and provided, further, that all taxes and assessments which are imposed or ordered to be imposed prior to the transfer of the title shall be paid by you. The above offers of sale and of lease are expressly subject to the condition that the gangway at the southerly boundary of said property, between Mathewson and Clemence streets, shall remain open as provided in the deeds to me, and also subject to the conditions and agreements as to party walls contained in the agreement between William H. Hall and Herbert D. Goff, trustees of the Central Real Estate Company, and myself, which agreement is duly recorded in the land records of the City of Providence; and, if you elect to take a lease of said premises, any payment or money or any other obligations resting upon me by the terms of said party wall agreement shall be assumed by you during the term of said lease. You further understand that the premises are now rented to tenants who hold from month to month and that it would be necessary to give sixteen days' notice in writing prior to the first of any month in order to have said premises vacated by the tenants. Rents from present tenants shall be apportioned if the deed or lease running to you is signed other than at the first of the month. This offer for you to purchase or lease the

above described premises shall remain open for twenty-five (25) days from this date. Yours very truly, (Signed) David F. Sherwood."

NOTE: From *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057.

SEC. 1354. AGREEMENT TO PURCHASE FRUIT ON TREES, WITH OPTION TO PURCHASE THE LAND, IMPROVEMENTS THEREON AND WATER RIGHTS, PART OF PRICE DEFERRED AND SECURED BY MORTGAGE.

"Memorandum of agreement made and entered into this fifth day of June, 1906, between Jesse Andrew Brown, of Tehama County, State of California, the party of the first part, and D. J. Canty, of Alameda County, State of California, the party of the second part; Witnesseth: The party of the first part, for and in consideration of the sum of four thousand dollars (4,000), does hereby grant and sell to the party of the second part all fruit on trees now standing in orchard of said first party situate on Thomas Creek, in the County of Tehama, State of California, and known as the 'Westlake Place,' and more particularly described as follows, to-wit:

(Here follows description.)

"The party of the second part shall have the free use of all trays, lug-boxes, cars and other equipment that [are] now on said place, and which [are] necessary for the proper harvesting of said fruit. The party of the first part agrees to furnish, free of charge, one span of mules and harness and wagon during the harvest season. The party of the second part agrees to make payment of said \$4,000 as follows: \$1,000 paid this 5th day of June, 1906, the receipt of which is hereby acknowledged by the party of the first part, the balance, \$3,000 to be paid as said fruit is sold. All fruit on said orchard to belong to and be the property of the party of the first part until said rental of \$4,000 is paid in full. In consideration of the party of the second part complying with the terms of this agreement, the party of the first part does hereby grant unto the party of the second part an option to purchase, during a term of six months from the date of this agreement, all of the lands hereinbefore described, with all permanent improvements now standing on said lands, and a one-half interest in



all water rights used in connection with said orchard and other lands, and recorded by said party of the first part as 3,000 miner's inches; the purchase price of said land to be eight thousand five hundred dollars (\$8,500), to be paid by the party of the second part to the party of the first part in sums as follows: \$3,500 to be paid on delivery of good and sufficient deed to above premises; the balance, \$5,000, to be secured by mortgage on said premises, and to be paid in three equal payments, in one, two and three years, from date of deed, with interest at 7 per cent. In the event of the party of the second part making payments as above, the party of the first part agrees to deliver to the party of the second part the above described orchard and enough farming land adjoining on the east side of said orchard to make up 120 acres. It is mutually agreed that this agreement, and every part and portion thereof will bind and inure to the benefit of the heirs, administrators and assigns of the respective parties to this agreement. In witness whereof, the parties to this agreement have hereunto set their hands and seals in duplicate the day and year first above written. Jesse Andrew Brown. (Seal.) D. J. Canty. (Seal.)”

NOTE: From *Canty v. Brown*, 11 Cal. App. 487, 105 P. 428.

SEC. 1355. AGREEMENT BY A TO REPURCHASE LAND CONVEYED BY HIM TO B IN CONSIDERATION FOR OR IN PAYMENT OF SHARES OF CAPITAL STOCK SOLD BY B TO A, THE REPURCHASE BEING AT THE OPTION OF B, WITH PROVISION AGAINST ASSIGNMENT BY B.

“DES MOINES, IOWA, Feb. 15th, 1895. Mr. D. K. McFarland, Des Moines, Iowa—Dear Sir: In consideration of the trade made between us today, in which you turn over to me your stock and all your interests in the Des Moines Fence Co., of Des Moines, Iowa, for a deed to lots numbers 147, 148, 149, 150, 151, 152, in East Capital Park Addition to the City of Des Moines, Iowa, which I am to have executed to you, I hereby agree that, in case you fail to dispose of said lots on or before August 15th, 1896, that I will on that date pay to you, or cause to be paid to you, \$1,800.00 (eighteen hundred dollars) for said lots, less the amount of incumbrance that may be

against them on that date; provided, you notify me that you desire me so to do ninety (90) days prior to August 15th, 1896; otherwise, this instrument to be null and void. I further agree that between this date and August 15th, 1896, you may sell and convey any part of above-described lots, giving me credit with the full amount of sale; but no lot shall be sold and credited to me at less than \$300.00 per lot. This instrument not transferable. Witness my hand, this 15th day of February, 1895. (Signed) H. McCormick."

NOTE: From *McFarland v. McCormick*, 114 Iowa 368, 86 N. W. 369.

SEC. 1356. OPTION TO PURCHASE AND AGENCY TO SELL ON COMMISSION, THE OPTIONOR BINDING HIMSELF TO CONVEY IN PENAL SUM, WITH PROVISION THAT IF OPTIONOR FAILS TO NOTIFY OPTIONEE, THE OPTION SHALL BE RENEWED FOR ONE YEAR.

"This indenture, made and entered into this 20th day of January, A. D. 1902:

"Witnesseth, That I, G. R. Carter, of Chicago, County of Cook, State of Illinois, in consideration of one dollar to me in hand paid by M. G. Love, of Tampico, County of Whiteside and State of Illinois, do grant to him, M. G. Love, the sole option to purchase the following described piece, parcel or lots of land of which I am the owner, namely, one hundred and twenty acres of land one mile southwest of Tampico, Ill., now occupied by John Nelson, \$1,000 to be paid March 15, 1902, \$8,240 to be paid March 15, 1903, if purchased by M. G. Love or sold by M. G. Love to another party. Now, if the said M. G. Love shall at any time before the expiration of this option so desire, I agree, in consideration of the sum of \$9,240, to convey to said M. G. Love, or as he shall direct, the above-described premises by clear warranty deed and good abstract of title. The above described property is not encumbered. For the faithful performance of the above agreement I bind myself in the penal sum of \$500, to be paid said M. G. Love if I fail to fulfill this agreement. I agree that if said M. G. Love be the cause of any person or persons purchasing the said above-described property, that he shall be and is entitled to a commission of all over \$77 per acre on

farm. I also agree that if, before the expiration of this option, I fail to notify said M. G. Love to the contrary, this option shall be considered renewed on same terms per purchase for one year, hereby binding myself, my heirs, my administrators or assigns for the fulfillment of this agreement at any time during the period of fifty-three days after date first above written.

“I have hereunto set my hand. G. R. Carter. (Seal.)”

NOTE: From *Carter v. Love*, 206 Ill. 310, 69 N. E. 85.

### SEC. 1357. AGREEMENT COMBINING OPTION TO PURCHASE AND AGENCY TO SELL ON COMMISSION.

“This agreement, entered into by and between Catherine Tolbert & Dorr McGlocklin of Vassar, as party of the first part, and Wm. Axe & Son, as party of the second part, witnesseth, that for a valuable consideration, the receipt of which is hereby acknowledged, said party of the first part has this day optioned unto said party of the second part the following real estate in Tuscola County, Mich., to-wit: 30 $\frac{1}{4}$  acres more or less all in section 11, town 11 north, range 7 east.

“Said party of the second part shall have the right to give option of sale to purchaser and to close the option hereby created at any time within twelve months from the date hereof, or a continuation of 90 days, if at the expiration of this agreement there is a deal pending, and said party of the first part hereby agrees that he will at any time before the expiration of said option, execute and deliver to said party of the second part, a good and sufficient warranty deed to said real estate, free from all liens and incumbrances, and to furnish said party of the second part an abstract of title showing perfect title.

“It is hereby agreed by the parties hereto that upon such demand being made and said deed executed and delivered as aforesaid that said party of the second part is to pay to said party of the first part the sum of \$30,000, which sum the party of the first part agrees to accept as full payment of the purchase price for said real estate.

“It is further agreed by the parties hereto that the above amount shall be paid as follows: \$15,000 cash on date of purchase (less a commission of 5% of the total purchase price above, to be paid to the party of the second part as their fee

out of the first payment on purchase price) \$15,000, the remainder of the purchase price to be paid as follows: To suit at 6% annual interest.

“Said party of the first part hereby agrees not to sell, or in any way to incumber said real estate during the term of the option hereby created, and that should he do so he will forfeit and pay to said party of the second part, as liquidated damages, the sum of \$750.

“It is further understood and agreed by the parties hereto that should the party of the first part fail, neglect or refuse to execute and deliver said deed when demanded as aforesaid, that said party of the first part will forfeit and pay to the party of the second part, as liquidated damages, the sum of \$1500.

“The failure, neglect or refusal of said party of the second part to close the option hereby created shall in no manner render him liable to said party of the first part, and he shall not become indebted thereby in any amount whatever.

“The present title to above described property is in Catherine Tolbert & Dorr McGlocklin. . . .

“In witness whereof said parties have hereunto set their hands and seals this 26th day of June, 1912. Catherine Tolbert. (L. s.) Dorr McGlocklin. (L. s.) P. O. Vassar, Mich.”

NOTE: From *Axe v. Tolbert*, 179 Mich. 556, 146 N. W. 418.

#### SEC. 1358. AGREEMENT HELD AGENCY TO SELL AND NOT OPTION.

“Agreement made this . . . . day of . . . . ., 1901, by and between . . . . . party of the first part, and W. R. Ballou & Co., party of the second part.

“Witnesseth: That in consideration of . . . . . dollars in hand paid, the receipt of which is hereby acknowledged, and the agreement hereinafter mentioned, said . . . . . gives to W. R. Ballou & Co., the exclusive privilege for . . . . . year. . . . from date hereof of selling his tract of land in Whitley County, Kentucky, described as follows:

. . . . .  
for the sum of . . . . . dollars per acre.

“Said W. R. Ballou & Co., upon their part, agree with said ..... that they will, to the best of their ability, endeavor to effect a sale of said lands, without charge or expense to said party of the first part, save and except that party of the first part, or assigns, shall have charge, [and] use his best endeavor to aid the said W. R. Ballou & Co. in the sale of the above-described lands, by showing all persons sent to view said lands, the lines, corners and improvements of same. Said party of the first part further agrees to furnish abstract of title and make a deed of general warranty for said lands upon demand of said W. R. Ballou & Co., upon sale being made as aforesaid. And all sales or other transfers whatsoever to be made by and through the said W. R. Ballou & Co.

“It is mutually understood and agreed between said parties, that said party of the first part shall retain possession of said lands, and receive all rents and profits from farming or grazing, arising therefrom until sale of said lands as aforesaid. No timber or mineral to be sold from said lands. The owner, however, has the right to use all the timber and minerals for his own use.”

NOTE: From *Faraday Coal & Coke Co. v. Owens*, 26 Ky. L. Rep. 243, 80 S. W. 1171.

#### SEC. 1359. OPTION AGREEMENT FOR PROPERTY TO BE TAKEN OVER BY PROPOSED CORPORATION.

WHEREAS, ..... of the Borough of ....., Pa., is the sole owner of land situate in the Third Ward of the Borough of ....., County of ..... and State of Pennsylvania, bounded and described as follows:

.....  
AND WHEREAS, ..... of the City of Philadelphia is engaged in consolidating the ..... Flour Mill and others, and has offered to purchase the mill, etc., ..... of the said (described property) ..... for the sum of twenty-five thousand dollars payable as hereinafter more particularly set forth, and the sum is a satisfactory consideration.

Therefore, I the undersigned, ....., in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, do hereby agree to prepare a deed for the property above described transferring the same to

....., his heirs or assigns, or to a corporation to be designated by him, and accept in payment thereof the sum of six thousand two hundred and fifty dollars in cash, and eighteen thousand seven hundred and fifty dollars in six per cent preferred stock of the ..... Company or such other company as may be organized by said ..... to acquire said property, and in addition the sum of eighteen thousand seven hundred and fifty dollars of the common stock of said Company.

In addition to the eighteen thousand seven hundred and fifty dollars of preferred and also of common stock as hereinbefore set forth, there is to be issued the sum of six thousand two hundred and fifty dollars in six per cent preferred stock and a like sum in common stock, which is to be transferred to the said ..... for the six thousand two hundred and fifty dollars in cash as hereinbefore set forth.

The deed to the property to be deposited in escrow with the ..... Trust Company of Philadelphia, Pa., on or before the 15th day of March, 19..., and upon delivery by the said ..... of the considerations named above the said deed shall be recorded in the office for Recording Deeds at ....., Pa., and become the property of the said ..... or Company.

It is also agreed that this option shall become void in case the ..... Flour Mill and others now contemplated do not go into the consolidation.

It is also agreed that the preferred stock issued by the said ..... Milling and Export Company shall be limited to such an amount as may be necessary to purchase milling property, and no preferred stock shall be issued for profit to any attorney, underwriter, promoter or Trust Company.

It is hereby further agreed that said ..... or said Trust Company shall pay to the vendor cash for the stock of grain, flour or feed on hand at the time of transfer at cost value, and in case the vendor and vendee can not agree upon a price then the vendor is to have the privilege of disposing of said grain, flour or feed to any one.

In case the said ..... fails to comply with the terms and conditions of this contract on or before .....,

19., the said Trust Company is hereby authorized to return said deed to the vendor and this contract should be of no further force or effect.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this .... day of ....., A. D. 1901.

..... (SEAL)

WITNESS:

.....

NOTE: From *Gochnauer v. Union Trust Co.*, 225 Pa. 503, 74 Atl. 371.

SEC. 1360. OPTION TO PURCHASE LAND, THE PRICE PAYABLE IN BONDS OF WAREHOUSE CORPORATION, THE ISSUANCE OF WHICH IS TO BE AUTHORIZED BY RAILROAD COMMISSION.

This agreement, made this .... day of ....., 191., by and between A B, of the ....., hereinafter called Optionor, and C D, of ....., hereinafter called Optionee,

WITNESSETH:

That for and in consideration of the sum of \$. .... paid by the Optionee, the receipt of which is hereby acknowledged by the Optionor, the Optionor gives and grants to the Optionee and to his assigns, the sole and exclusive right, privilege and option of purchasing the following described real property, owned by the Optionor, in fee simple, and situate in the ....., County of ....., State of ....., described as follows, to-wit:

(Insert description.)

Together with all the appurtenances thereunto belonging or in anywise appertaining, including all rights of way for switches and other easements and privileges used in connection therewith or necessary for the operation of the said property as a warehouse.

1. This option shall continue in force for the period of .... days from the date hereof, and since the purpose of securing this option and of acquiring said property is to convey and transfer the same to the X Y Warehouse Corporation, a corporation, incorporated under the laws of the State of ....., and which corporation desires to erect thereon a public warehouse, authority and permission to issue and

sell bonds and capital stock for the construction of which must be secured through proceedings for that purpose before the Railroad Commission of the State of . . . . ., IT IS UNDERSTOOD AND AGREED that the said Optionee or his assignee shall have . . . . days from and after the receipt of written notice from the Secretary of said Railroad Commission of the grant of such authority or permission by said Commission within which to exercise the said option, provided, however, that the time for election hereunder shall not extend beyond . . . . .

2. The price for said property, if election shall be made, is the sum of \$. . . . ., but an election having been made and title acquired as hereinafter provided, the said price may be paid in bonds of the said X Y Warehouse Corporation, to be authorized and issued by said corporation, in the amount of \$. . . . ., upon proper proceedings for that purpose, at the face or market value of \$. . . . ., bearing interest at the rate of . . . . % per annum, secured by a first mortgage or deed of trust covering the said optioned property, the said bonds to be serial in form and in denominations of \$. . . . . each, and the bonds so to be delivered shall be those first maturing, and otherwise be in such form and contain such terms and conditions as shall be authorized by said Railroad Commission; provided, and it is expressly understood and agreed that any delay caused by the proceedings aforesaid which shall be prosecuted with due diligence, shall extend the time of performance by the Optionee, or his assignee, and provided further, that the Optionee or his assignee shall, at any time, or in any stage of the proceedings have the right or privilege of paying \$. . . . . cash in lieu of the delivery of the said bonds.

3. Within . . . . days after notice of election to purchase hereunder, given by the Optionee, or his assignee, which notice may be given by leaving the same in a sealed envelope addressed to the Optionor at . . . . . in the City of . . . . ., State of . . . . ., the Optionor shall furnish, at his own cost and expense, and deliver to the Optionee at . . . . ., in the City of . . . . ., an unlimited certificate of title to the said property, made by some reputable abstract and title company in the City of



....., acceptable to the Optionee, and the Optionee or his assignee shall have .... days after the receipt of the same within which to examine the said certificate and to determine for himself whether or not the title is well vested and free and clear, and whether or not he is willing to accept the same, and if the said title is accepted, then the said bonds shall be issued under and in pursuance of the authority of the said Railroad Commission and delivered to the Optionor, or the said cash payment made as hereinafter provided, it being understood and agreed that the title to be conveyed hereunder is a fee simple title and free and clear of and from all liens and encumbrances except taxes for the current tax year, which the Optionor obligates himself to pay, and upon the delivery of the said bonds or the payment of the said cash price as aforesaid, the said Optionor covenants and agrees to convey to the said Optionee or his assignee, the said fee simple title to said property, free and clear as aforesaid, and since it will be necessary to have a delivery of the said deed in order to enable the Optionee or his assignee, to execute the trust deed securing said bonds and to issue and deliver the said bonds, the Optionor agrees to deliver his said deed in escrow with such responsible person as shall be designated by the Optionee, under instructions to the effect that the escrow holder is authorized to deliver the said deed upon receiving the said bonds for the price of said property.

4. The said Optionor shall also have made a survey of the exterior lines of the said optioned property and furnish a map thereof to the Optionee, with and upon the delivery of said certificate of title. The Optionor shall also, within three months from the delivery of said deed of conveyance, at his own cost and expense, provide or furnish for the use of the Optionee and as appurtenant to the said optioned property, a right of way to extend the present switch of the A. P. Railway Company to and along the south side of said property, and to extend, or cause to be extended, the said switch along the said south side for the purpose of receiving and discharging freight from said property. Said Optionor shall also, at his own cost and expense, and within said period of .... months, pave, or cause to be paved, in accordance with the specifications of the City of ....., for asphalt

pavement, the respective streets on the north, south and west sides of said optioned property.

5. IT IS FURTHER AGREED that the said bonds so to be delivered as aforesaid, shall be underwritten by some reputable person, firm or corporation, selected by the Optionee, and that the said trust deed or mortgage securing the said bond issue, shall contain a covenant to the effect that the grantor or mortgagor shall pay the normal United States income tax required by law to be retained by it at the source.

WITNESS the hands of the said parties, the day and year first above written.

Executed in duplicate.

A B

C D

SEC. 1361. OPTION TO PURCHASE WITH PROVISION AGAINST RECORDING OPTION BUT PROVIDING FOR DEPOSIT OF IT WITH THIRD PERSON, AND UPON FAILURE TO GIVE NOTICE OF ELECTION, TO BE SURRENDERED FOR CANCELLATION.

“We, Carl H. Willig and Antonie Willig, his wife, of the City of Chicago, Township of Jefferson, for and in consideration of the sum of one dollar, and other valuable consideration to us in hand paid by De La Moine Wickersham, of Chicago, do hereby give to the said De La Moine Wickersham, heirs and assigns, the privilege of purchasing, on or before the first day of January, A. D. 1892, the following described real estate, situate in the County of Cook and State of Illinois, to-wit: A certain tract of land in the southeast fractional quarter of section five (5), township forty (40), range thirteen (13) east of the third P. M., known as the ‘Fritz Willig Land,’ containing thirty-one 745/1000 acres; also ninety feet front on Elston Road, extending back to the half section line, and containing one 85/100 acres, with all buildings thereon, at and for the price of four hundred (\$400) dollars per acre, to be paid as follows, viz: One-fifth at time of delivering of deed, in cash; the balance, two, three, four, and five equal payments, annually, on or before, with release of any five acres, upon payment of the pro rata amount due thereon, with [interest at] six per cent per annum, to be secured by mortgage or trust deed on said real estate [to] Carl H. Willig, said

cash payment to be made and securities delivered on or before the first day of December, A. D. 1892, [by] De La Moine Wickersham, or his assigns. I also agree to furnish a good abstract of title, showing good title to said real estate. In case the privilege of purchase hereby given is exercised, the price above named paid and secured, and the securities accepted as above provided, we agree to convey and assure the said real estate to said De La Moine Wickersham, heirs and assigns, by good and sufficient warranty deed, reciting a consideration of \$13,200, free and clear of all liens or incumbrances whatsoever, except as to taxes and assessments or impositions levied, assessed, or imposed upon said real estate subsequent to the year 1892. This instrument shall not be recorded, but is deposited by the said parties by mutual agreement with J. R. Wickersham; and in case the privilege of purchase hereby given is not exercised and the conditions hereof fully performed by said De La Moine Wickersham, heirs or assigns, and written notice of such exercise and performance given by J. R. Wickersham to said Carl H. Willig, on or before the first day of January, A. D. 1892, said privilege shall thereupon wholly cease, but no liability to refund the money paid therefor shall arise, said abstracts of title to be returned in good order, and said J. R. Wickersham shall at once surrender this instrument to said parties for cancellation. During the existence of said privilege of purchase, the instrument shall be binding on their heirs, executors, administrators, and assigns, who may exercise the rights herein reserved by them, and receive the surrender above mentioned. Witness my hand and seal this 28th day of May, A. D. 1890. Carl H. Willig. (Seal.) Antonie Willig. De La Moine Wickersham. Witness: A. S. Wright."

NOTE: From *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755.

SEC. 1362. OPTION CLAUSE REQUIRING WRITTEN NOTICE OF ELECTION AND TENDER OF PRICE ON DELIVERY OF DEED OF CONVEYANCE.

"Notice of the determination of the second party to make purchase shall be given in writing to first party, on or before the expiration of said period, as aforesaid. . . . The second party shall not be bound to make any tender of the purchase

price, but the same shall be paid to the first party upon delivery to the second party of a warranty deed to said coal and other mineral, as aforesaid.”

NOTE: From *Consolidated Coal Co. v. Findley*, 128 Iowa 696, 105 N. W. 206.

#### SEC. 1363. WILL OPTION IN GIVING LEGATEE RIGHT TO PURCHASE.

“If any of the residuary legatees desire to purchase any of the personal property or real estate owned by me they may do so at its current market price at the time of my death, as valued by my executors and trustees, the survivors or survivor of them, and the same shall be charged against their respective shares or interest as money paid to them by the executors and trustees, the survivors or survivor of them in accordance with the provisions of this will.”

NOTE: From *In re Walbridge*, 198 N. Y. 234, 91 N. E. 590.

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